REFORMING THE IMMIGRATION SYSTEM

Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases

AMERICAN BAR ASSOCIATION
Defending Liberty
Pursuing Justice

Commission on Immigration

Reforming the Immigration System

Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases

Report

Prepared by Arnold & Porter LLP for the American Bar Association Commission on Immigration

American Bar Association
Commission on Immigration
740 Fifteenth Street, NW
Washington, DC 20005-1022
202-662-1005

The American Bar Association hereby grants permission for copies of the materials herein to be made, in whole or in part, for classroom use in an institution of higher learning or for use by not-for-profit legal service organizations, provided that the use is for informational, non-commercial purposes only and any copy of the materials or portion thereof acknowledges original publication by the ABA, including the title of the publication, the name of the author, and the legend: "Reprinted by permission of the American Bar Association. All rights reserved." No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without the prior written permission of the publisher. To request permission, contact the ABA's Department of Copyrights and Contracts at: www.abanet.org/reprint.

The materials contained herein represent the opinions of the authors and editors and should not be construed to be those of either the American Bar Association or Commission on Immigration unless adopted pursuant to the bylaws of the Association. Nothing contained herein is to be considered as the rendering of legal advice for specific cases, and readers are responsible for obtaining such advice from their own legal counsel. These materials and any attachments or related materials herein are intended for educational and informational purposes only.

Printed in the United States of America

ISBN 1-60442-615-2

© American Bar Association 2010
All rights reserved

Acknowledgements

The American Bar Association Commission on Immigration is sincerely grateful to Arnold & Porter LLP for developing and writing this report on a pro bono basis over the course of more than one year. More than fifty volunteer attorneys and staff in Arnold & Porter's offices in Washington, D.C., New York, Denver, Los Angeles, and San Francisco, devoted thousands of hours to researching the Department of Justice's Executive Office for Immigration Review, federal courts of appeals, Article I courts, administrative agencies, and the Department of Homeland Security to develop the recommendations in this report. They interviewed countless government officials, judges, immigration law practitioners, and other experts and met extensively with the Commission during the research and drafting process. We are humbled by the tremendous level of work that was invested in this report and deeply appreciative of the commitment of Arnold & Porter to this endeavor, as well as the professionalism reflected in their final product.

The study would not have been possible without the thorough, consistent, and direct leadership of Lawrence Schneider, who guided and inspired the Arnold & Porter team throughout the development of this study. Special appreciation is also due to Michael Lee of Arnold & Porter, and to the other attorneys who led the research and drafting of sections of the report: Lily Lu, William Cook, Wilson Sweitzer, Christopher Flack, Scott Morrow, and Asim Varma. On the following page is a list of the Arnold & Porter attorneys and legal assistants who devoted tremendous amounts of time and energy to the preparation of this study. We would also like to thank the many individuals, experts, and stakeholders who have provided information and guidance to the research team and the Commission.

We are grateful to members of the Commission, its Advisory Committee, and liaisons past and present who have assisted with this effort for more than two years, and to former Commission Chair Mark Agrast who saw to the inception of this project, as well as the Commission staff who have offered support and shepherded the study to completion, including former Commission Director Irena Lieberman, current Director Megan Mack, Claire Trickler-McNulty, Anne Schaufele, Reneé Minor, and Brooke Denmark.

Karen T. Grisez
Chair, Commission on Immigration
February 2010

Arnold & Porter LLP Volunteers

The following is a list of the Arnold & Porter LLP attorneys, law clerks, and legal assistants who devoted tremendous amounts of time and energy to the preparation of this report.

Attorneys
Zachary B. Allen
Avi M. Baldinger
Elizabeth J. Betta
Lauren R. Bittman
Meki L. Bracken
Yue-Han Chow
William E. Cook, Jr.
Damon Elder
Christopher J. Flack
Raymond Geluz
Dorothy N. Giobbe
Ken L. Hashimoto
Kristin Hicks
Jennifer L. Hogan
Eunice Y. Kang
Mark A. Kleyna
John R. Lawless
Michael A. Lee
Michael P. Lewis
Lily J. Lu
Marco Martemucci
Eric McKeown
Nicole L. Molife
Christopher S. Morrow
John L. Newby
Grace Pickering
Holly L. Prutz
Kyle P. Reynolds
Katherine A. Ross
Marian A. Saxena
Lawrence A. Schneider
Aaron S. Schur
Kathleen A. Scott
Rashmi Seth
Angela J. Showalter
Cristina M. Sorgi
Elissa Spencer
Wilson D. Sweitzer
Christine Taylor
Asim Varma
Thiruvendran Vignarajah
Craig W. Wise

Law Clerks
Solon Phillips
Carl M. Szabo

Legal Assistants
Ahmed Almudallal
Denise M. Blackburn
Laura E. Boorman
Emily L. Clark
Laura A. Dickson
Randy M. Haight
Cinthya I. Ibanez
Caroline E. Johnson
Kathryne D. Lindsey
Virginia P. Martin
Rodlena I. Sales
Sierra M. Visher
Tamar D. Zilkha

American Bar Association Commission on Immigration

Commission
Karen T. Grisez, Chair
Wafa Abdin
Katherine Anne Brady
Roxella T. Cavazos
Sara Elizabeth Dill
Marielena Hincapié
Daniel Kanstroom
Donald Kerwin
JoNel Newman
Andrew I. Schoenholtz
Margaret D. Stock
Carlina Tapia-Ruano
Kathleen C. Walker

Advisory Committee
Muneer Iftikhar Ahmad
Neil S. Dornbaum
Christina Fiflis
Robert Juceam
Dan Kowalski
Christopher V. Nugent
Anna Williams Shavers
Macarena R. Tamayo-Calabrese
Miko A. Tokuhama-Olsen
Ellen G. Yost

Background and Study Approach

This study provides a comprehensive review of the current system for determining whether a noncitizen should be allowed to stay in the country or should be deported or removed from the United States. The study seeks to determine how well various aspects of the existing system are working and identifies reforms that could improve the system.

The ABA Commission on Immigration

The American Bar Association ("ABA" or "Association") is a voluntary, national membership organization of the legal profession. Its more than 400,000 members, from each state and territory and the District of Columbia, include prosecutors, public defenders, private lawyers, legislators, law professors, law enforcement and corrections personnel, judicial officers, government attorneys, law students, and a number of non-lawyer associates in allied fields. The ABA's Commission on Immigration (the "Commission") leads the Association's efforts to ensure fair treatment and full due process rights for immigrants and refugees within the United States. Acting with other Association entities, as well as governmental and non-governmental bodies, the Commission:

(1) advocates for statutory and regulatory modifications in law and governmental practice consistent with ABA policy;

(2) provides continuing education and timely information about trends, court decisions, and pertinent developments for members of the legal community, judges, affected individuals, and the public; and

(3) develops and assists the operation of pro bono programs that encourage volunteer lawyers to provide high quality, effective legal representation for individuals in immigration proceedings, with a special emphasis on the needs of the most vulnerable immigrant and refugee populations.

The ABA has issued policy recommendations on many issues relating to immigration, not limited to the issues addressed in this Study. Those policy positions are available on the ABA website. Some of these issues include supporting comprehensive immigration reform that fairly and realistically addresses the U.S. undocumented population, the need for immigrant labor, the value of timely family reunification, and the need for an effective and credible immigration strategy; strengthening the DHS Immigration and Customs Enforcement detention standards, adopting them as regulations, and ensuring they apply to all noncitizens who are detained for immigration purposes; supporting due process and access to legal assistance for individuals arrested or detained in connection with immigration enforcement actions; and supporting enabling a U.S. citizen or permanent resident to sponsor a same sex partner for permanent residence in the United States.

Arnold & Porter LLP

In August 2008, the ABA Commission on Immigration requested Arnold & Porter LLP to research, investigate, and prepare this study concerning issues and recommendations for reforms to the United States adjudication system for the removal of noncitizens (the "Study").

Arnold & Porter LLP ("Arnold & Porter") is a large, international law firm with about 700 lawyers in eight offices in the United States and Europe practicing in more than 25 distinct areas of the law and conducting business on six continents. Arnold & Porter represents small and large companies, governments, and individuals in the United States and around the world, and, through its pro bono program, represents nonprofit entities and disadvantaged individuals, including noncitizens in removal proceedings and a variety of other immigration matters.

Over the course of more than one year, approximately 50 Arnold & Porter lawyers and legal assistants participated in the research, investigation, and preparation of this Study. All of them participated pro bono. As the ABA Commission on Immigration directed, the Arnold & Porter team approached the project without preconceived notions or conclusions and sought information and views from all sources and sides.

Structure and Focus of This Study

To conduct this Study, Arnold & Porter divided its team into subgroups that focused on the issues relating to the four major government entities involved in the process:

(1) the Department of Homeland Security ("DHS");

(2) immigration judges and the immigration courts;

(3) the Board of Immigration Appeals ("BIA"); and

(4) the federal circuit courts that review BIA decisions.

In addition, two other subgroups focused on issues that affect the overall system:

(5) representation in removal proceedings; and

(6) system restructuring.

The questions asked by the Arnold & Porter team include:

(1) What are the problems with the current removal adjudication system?

- Does the existing system provide fair decision making and due process to those who become subject to the system?
- Does the existing system provide efficient and timely decision making?
- Do those who are involved in the removal adjudication process (DHS officials, immigration judges, BIA Members, and others) have a sufficiently high level of professionalism?

(2) What steps could be taken within the existing structure to improve the removal adjudication system?

(3) Should the current overall structure of the removal adjudication system be changed and, if so, how?

To answer these questions, this Study reviews the problems that have been identified by attorneys, judges, advocacy groups, academics, and others and provides recommendations for addressing those problems. In formulating recommendations, our goals are to:

- **Goal 1:** Make immigration judges at both the trial level and the appellate level sufficiently independent, with adequate resources, to make high-quality, impartial decisions free from any improper influence;
- **Goal 2:** Ensure fairness and due process and the perception of fairness by participants in the system;
- **Goal 3:** Promote efficient and timely decision making without sacrificing quality; and
- **Goal 4:** Increase the professionalism of the immigration judiciary.

Arnold & Porter lawyers and legal assistants gathered and reviewed hundreds of articles, reports, legislative materials, and other documents, and conducted scores of interviews with participants in the removal adjudication system — attorneys, judges, advocacy groups, academics, and others — to gather views from all perspectives concerning the existing problems in the system and to identify possible solutions.

Those who were interviewed generally were told that their comments may be used in preparing the Study and that some of their comments might be included in the Study without specific attribution, but that a particular quote or the substance of a comment would not be directly attributed without the interviewee's approval. We thank all of those who spoke with the Arnold & Porter team and provided materials and information in connection with this Study.

In the Executive Summary, we summarize our key findings and recommendations. In this Report, we set out our Report in full, with extensive background information, identification and discussion of the issues, and our analysis and recommendations for reform.

Summary Table of Contents

PART 1: DEPARTMENT OF HOMELAND SECURITY 1-1
I. Introduction on the Department of Homeland Security 1-5
II. Background on the Department of Homeland Security 1-6
III. Issues Relating to the Department of Homeland Security 1-25
IV. Recommendations Relating to the Department of Homeland Security 1-59
PART 2: IMMIGRATION JUDGES AND IMMIGRATION COURTS 2-1
I. Introduction on Immigration Judges and Immigration Courts 2-4
II. Background on Immigration Judges and Immigration Courts 2-4
III. Issues Relating to Immigration Judges and Immigration Courts 2-15
IV. Recommendations Relating to Immigration Judges and Immigration Courts 2-28
PART 3: BOARD OF IMMIGRATION APPEALS 3-1
I. Introduction on the Board of Immigration Appeals 3-3
II. Background on the Board of Immigration Appeals 3-4
III. Issues Relating to the Board of Immigration Appeals 3-10
IV. Recommendations Relating to the Board of Immigration Appeals 3-27
PART 4: JUDICIAL REVIEW BY CIRCUIT COURTS 4-1
I. Introduction on Judicial Review by Circuit Courts 4-3
II. Background on Judicial Review by Circuit Courts 4-5
III. Issues Relating to Judicial Review by Circuit Courts 4-9
IV. Recommendations Relating to Judicial Review by Circuit Courts 4-20
PART 5: REPRESENTATION 5-1
I. Introduction on Representation 5-3
II. Background on Representation 5-3
III. Issues Relating to Representation 5-8
IV. Recommendations Relating to Representation 5-10
PART 6: SYSTEM RESTRUCTURING 6-1
I. Introduction on System Restructuring 6-4
II. Background on System Restructuring 6-7
III. Evaluation of Options for System Restructuring 6-26
IV. Recommendations for System Restructuring 6-35
Table 6-1: Features of Major Restructuring Systems 6-37
Table 6-2: Comparison of Major Restructuring Options 6-40
Appendix 6-A: Other U.S. Adjudication Systems 6A-1

Detailed Table of Contents

PART 1: DEPARTMENT OF HOMELAND SECURITY 1-1

I. Introduction on the Department of Homeland Security 1-5

II. Background on the Department of Homeland Security 1-6

- A. Basic Terms and Concepts 1-6
- B. Structure of the Immigration Function at DHS 1-8
- C. Initiation of Removal Proceedings 1-10
  - 1. Removal Proceedings Initiated by USCIS Officers 1-15
    - a. Credible Fear Determinations by USCIS Asylum Officers 1-15
    - b. Affirmative Asylum Determinations by USCIS Asylum Officers 1-16
    - c. Other USCIS Determinations 1-17
  - 2. Removal Proceedings Initiated by CBP Officers 1-18
  - 3. Removal Proceedings Initiated by ICE Officers 1-19
    - a. Worksite Enforcement 1-20
    - b. National Fugitive Operations Program 1-21
    - c. Apprehension by Local Agencies under 287(g) Program 1-22
    - d. Criminal Alien Program and Secure Communities 1-23

III. Issues Relating to the Department of Homeland Security 1-25

- A. DHS Policies and Procedures Increase Case Load Burdens in the Removal Adjudication System 1-25
  - 1. Case Load Burdens and Use of Resources 1-25
  - 2. Insufficient Use of Prosecutorial Discretion 1-26
    - a. Immigration and Customs Enforcement Officers 1-27
    - b. Customs and Border Protection Officers 1-27
    - c. USCIS Officers in the Domestic Operations Directorate 1-27
    - d. DHS Trial Attorneys 1-28
- B. Coordination Problems within DHS Lead to Inconsistent Positions 1-29
- C. Removal on the Ground of an Aggravated Felony Conviction Has Expanded to Include Minor Crimes, Burdened the Adjudication System, and Deprived Many Noncitizens of Access to Court Review 1-30
  - 1. Expanded Ground for Removal for an Aggravated Felony Conviction 1-30
    - a. Consequences of an Aggravated Felony Conviction 1-32
    - b. Problems Arising from Expansion of Removal on the Ground of an Aggravated Felony Conviction 1-33
  - 2. Administrative Removal Procedures for Non-Lawful Permanent Residents Alleged to be Removable on the Ground of Aggravated Felony Convictions 1-34

D. Removal on the Ground of a Conviction of a Crime Involving Moral Turpitude Has Expanded to Include Misdemeanor Convictions and Has Burdened the Adjudication System 1-37
1. Expanded Scope of Removal on the Ground of a Conviction of a Crime Involving Moral Turpitude 1-38
2. 2008 Revision of the Categorical Approach to Determining Whether a Criminal Conviction is of a Crime Involving Moral Turpitude 1-38
E. Expanded Use of Expedited Removal Proceedings Has Deprived Many Noncitizens of Access to the Immigration Courts 1-40
1. Expanded Use of Expedited Removal 1-41
2. Expedited Removal at Ports of Entry 1-42
3. Expedited Removal within the Interior of the United States 1-43
4. Problems in the Implementation of Expedited Removal 1-44
F. Issues Relating to Adjustments to Lawful Permanent Resident Status 1-46
1. Bars on Admission 1-47
2. Service of Notices to Appear on Persons Eligible for Lawful Permanent Resident Status 1-48
G. Increased Use of Detention Raises Both Efficiency and Fairness Issues 1-49
1. Rapid Growth in Use of Detention 1-50
2. Mandatory Detention 1-52
3. Alternatives to Detention 1-53
4. DHS Parole and Bond Policies 1-56
a. Parole 1-56
b. Release on Bond 1-57
5. Location and Transfers of Detainees 1-57
IV. Recommendations Relating to the Department of Homeland Security 1-59
A. Reduce Burdens and Increase Efficiency in the Removal Adjudication System 1-59
1. Increase the Use of Prosecutorial Discretion to Reduce Unnecessary Removal Proceedings and Litigation 1-60
a. DHS Officer Prosecutorial Discretion 1-60
b. DHS Attorney Prosecutorial Discretion 1-60
2. Give DHS Attorneys Greater Control over the Initiation of Removal Proceedings 1-61
3. To the Extent Possible, Assign Cases to Individual DHS Trial Attorneys 1-61
4. Allow Asylum Officers to Approve Defensive Asylum Claims 1-61
a. Asylum Claims Made in Expedited Removal Cases 1-61
b. Defensive Asylum Claims Made in Removal Proceedings in the Immigration Courts 1-63
c. Authority Required to Implement Recommendations 1-64
5. Cease Issuing Notices to Appear to Noncitizens Prima Facie Eligible to Adjust to Lawful Permanent Resident Status 1-64
B. Implement Mechanisms to Coordinate Immigration Positions and Policies among the Various Components of DHS 1-65

C. Amend Unfair Laws that Burden the Removal Adjudication System 1-65
1. Permit All Noncitizens who are Eligible to Become Legal Permanent Residents to Adjust Their Status in the United States or Eliminate Bars to Reentry 1-65
2. Revise the Definition of Aggravated Felony and Repeal Retroactive Application of the Aggravated Felony Provisions 1-66
3. Revise the Definition of a Crime Involving Moral Turpitude and Reinstate the Application of the Categorical Approach to Moral Turpitude Determinations 1-67
a. Require the Imposition of a Sentence of One Year or More for Removal on the Ground of a Single Conviction of a Crime Involving Moral Turpitude or Require a Potential Sentence of More than One Year 1-67
b. Reinstate the Application of the Categorical Approach to Moral Turpitude Determinations 1-67
D. Reform Administrative and Expedited Removal Proceedings 1-67
1. Prohibit Use of Administrative Removal Proceedings to Remove Minors, the Mentally Ill, Noncitizens who Claim a Fear of Persecution or Torture, and Noncitizens with Significant U.S. Ties 1-68
2. Limit Application of Expedited Removal Proceedings to Certain Types of Individuals 1-69
a. No Application of Expedited Removal Proceedings to Persons within the Interior of the United States 1-69
b. No Application of Expedited Removal Proceedings to Unaccompanied Minors or the Mentally Ill 1-69
3. Limit Expedited Removal Solely to Persons with Improper or Missing Documentation 1-70
4. Improve Supervision of Inspection Process at Ports of Entry and Border Patrol Stations and Make Any Recording of Interviews of Noncitizens during the Inspection Process Available to Such Noncitizens and Their Representatives 1-70
5. Expand Judicial Review of Administrative and Expedited Removal Orders 1-71
a. Administrative Removal Orders on the Ground of Aggravated Felony Convictions 1-71
b. Expedited Removal Orders 1-71
E. Improve Efficiency and Fairness by Revising Detention Policies 1-71
1. When Possible, Exercise Discretion to Refrain from Detaining Persons Not Subject to Mandatory Detention 1-71
2. Improve and Expand Alternatives to Detention and Use Them Only for Persons who Would Otherwise Be Detained 1-72
3. Expand the Use of Parole to Reduce the Detained Population of Asylum Seekers 1-72
4. Increase Controls on the Location and Transfers of Detainees 1-73

PART 2: IMMIGRATION JUDGES AND IMMIGRATION COURTS 2-1
I. Introduction on Immigration Judges and Immigration Courts 2-4
II. Background on Immigration Judges and Immigration Courts 2-4
A. The Creation and Organization of the Immigration Courts 2-6
B. The Nature of Immigration Court Proceedings 2-8
C. The Hiring, Training, Supervision, and Discipline of Immigration Judges 2-9
1. The Hiring of Immigration Judges 2-10
2. Professional Development and Training Resources 2-11
3. Supervision, Performance, and Discipline of Immigration Judges 2-12
a. Caseload Management 2-12
b. Supervision and Performance Reviews 2-13
c. Ethics and Conduct of Immigration Judges 2-14
d. Complaints and Discipline 2-14
4. Tenure, Retention, and Removal of Immigration Judges 2-15
III. Issues Relating to Immigration Judges and Immigration Courts 2-15
A. Immigration Judges 2-16
1. Large Caseloads and Inadequate Staffing 2-16
2. Issues with the Selection of Immigration Judges 2-18
a. Inadequate Standards and Lack of Public Input 2-18
b. Lack of Diversity Among Immigration Judges 2-19
c. Bias and Lack of Proper Temperament 2-19
3. Insufficient Training and Professional Development 2-19
4. Inadequate Supervision and Discipline 2-21
a. Lack of Appropriate Supervision 2-21
b. Lack of Transparency and Accountability in Discipline 2-22
c. Improper Political Influence 2-24
5. Tenure, Retention, and Removal of Immigration Judges 2-24
B. Problems With Immigration Court Proceedings 2-25
1. The Way in Which Decisions Are Rendered 2-25
2. Inadequate Technological Resources 2-26
3. Problems with Videoconferencing 2-26
C. Status of 2006 Reforms Announced by the Attorney General 2-27
IV. Recommendations Relating to Immigration Judges and Immigration Courts 2-28
A. Recommended Changes to the Hiring, Tenure, and Removal of Immigration Judges 2-29
1. Provide Additional Hiring Criteria and More Public Participation in the Hiring Process 2-29
a. Additional Hiring Criteria 2-29
b. More Public Participation in the Hiring Process 2-29
2. Protect Immigration Judges from Removal Without Cause 2-29

B. Recommended Changes to Supervision and Discipline of Immigration Judges....2-30
1. Improve Supervision of Immigration Judges by Increasing the Number of ACIJs and Expanding Their Deployment to Regional Courts....2-30
2. Consolidate, Clarify, and Strengthen Codes of Ethics and Conduct Applicable to Immigration Judges....2-31
3. Implement Judicial-Model Performance Reviews for Immigration Judges....2-32
4. Make the Disciplinary Process for Immigration Judges More Transparent and Independent....2-35
C. Recommended Changes to the Administration and Procedures of the Immigration Courts....2-36
1. Request Additional Immigration Judges and Support....2-36
2. Require More Written, Reasoned Decisions....2-38
3. Increase Administrative Time Available to Immigration Judges....2-39
4. Provide Additional Training and Support for Immigration Judges....2-39
5. Improve Data Collection and Analysis Regarding the Performance of Immigration Judges and Immigration Courts....2-40
6. Integrate Technology into Immigration Courtrooms to Facilitate Fair and Efficient Proceedings....2-40
a. Expand Digital Audio Recording Systems....2-40
b. Limit the Use of Videoconferencing....2-41
7. Make Greater Use of Prehearing Conferences....2-41

PART 3: BOARD OF IMMIGRATION APPEALS....3-1

I. Introduction on the Board of Immigration Appeals....3-3
II. Background on the Board of Immigration Appeals....3-4
A. Structure of the Board of Immigration Appeals....3-4
B. Standards Governing Adjudication by the Board of Immigration Appeals....3-6
1. The 1999 Streamlining Reforms....3-6
2. The 2002 Streamlining Reforms....3-7
3. The 2006 Attorney General's Measures to Improve the Immigration Courts and the Board of Immigration Appeals....3-8
4. The 2008 Proposed Streamlining Reforms....3-9
III. Issues Relating to the Board of Immigration Appeals....3-10
A. The BIA Delays Immigration Adjudication....3-10
B. Too Many Appeals Are Decided by Single Board Members....3-12
C. The BIA Issues Too Few Reasoned Opinions....3-13
D. Limits on the Board's Standard of Review Prevent it From Addressing Disparities Among Immigration Judges....3-15
E. Time Limits on Appellants and Board Members are Unduly Abbreviated....3-16
F. The BIA Does Not Generate Enough Precedent....3-17
G. The BIA Is Insufficiently Independent....3-20
H. The BIA Lacks Sufficient Resources to Deal with Its Caseload....3-21

I. Assessing the Harm 3-21
1. Appeals to Federal Courts 3-21
2. Reversal and Remand Rates 3-24
3. Current BIA Processes Appear to Favor the Government 3-26
4. Decisional Disparity Among Immigration Judges 3-27
IV. Recommendations Relating to the Board of Immigration Appeals 3-27
A. Require Three-Member Panel Review for Non-Frivolous Appeals 3-28
B. Improve the Quality of Board Decisions 3-29
1. Require that Written Decisions Respond to all Non-Frivolous Arguments Raised by the Parties 3-29
2. If Retained, Make Affirmances Without Opinions Discretionary Rather than Mandatory 3-29
C. Permit De Novo Review of Immigration Judge Factual Findings and Credibility Determinations 3-29
D. Relax Time Limits on Board Members 3-30
E. Encourage Publication of Precedent Decisions and Increase Access to Non-Precedent Decisions 3-30
F. Apply to Board Members the Code of Conduct Proposed for Immigration Judges in Part 2 of this Report 3-31
G. Increase the Resources Available to the Board 3-31

PART 4: JUDICIAL REVIEW BY CIRCUIT COURTS 4-1

I. Introduction on Judicial Review by Circuit Courts 4-3
II. Background on Judicial Review by Circuit Courts 4-5
A. Judicial Review Prior to 1996 4-5
B. The 1996 Amendments to the INA: AEDPA and IIRIRA 4-6
C. The REAL ID Act of 2005 4-8
III. Issues Relating to Judicial Review by Circuit Courts 4-9
A. The Elimination of Judicial Review of Discretionary Decisions Is Overbroad 4-9
B. By Stripping Habeas Corpus Jurisdiction and Restricting Remand, Congress Has Virtually Eliminated Courts' Ability to Order Fact Finding 4-12
1. Habeas Jurisdiction and Circuit Court Review through 1996 and in 2005 4-12
2. Court of Appeals Review is Inadequate Where Additional Fact Finding is Necessary 4-14
C. The 30-Day Deadline for Filing Petitions for Review Frustrates Judicial Review 4-16
D. Perspectives on the Increased Immigration Case Load at the Courts of Appeals 4-17
E. Assessment of Consolidation of Immigration Appeals in One Circuit 4-18
IV. Recommendations Relating to Judicial Review by Circuit Courts 4-20
A. The 1996 Amendments Precluding Judicial Review of Certain Discretionary Decisions Should be Repealed 4-20
B. Congress Should Allow Courts of Appeals to Remand to the BIA for Further Fact Finding in Sufficiently Compelling Circumstances 4-21
C. The Deadline for Filing a Petition for Review to the Courts of Appeals Should Be Extended to 60 Days with a Provision to Request Additional Time, and a Final Removal Order Should Specify the Circuit for Appeal 4-21

APPENDIX OF TABLES – JUDICIAL REVIEW BY CIRCUIT COURTS 4-23
Table 4-1: BIA Decisions Appealed to Court of Appeals: 1998-2008 4-24
Table 4-2: Total Appeals by Circuit: 2000-2008 4-25
Table 4-3: Reversal and Remand Rates for Asylum Cases by Circuit Court: 2004-2005 4-28

PART 5: REPRESENTATION 5-1
I. Introduction on Representation 5-3
II. Background on Representation 5-3
A. The Current State of the Law 5-3
1. Right to Representation 5-3
2. Right to Effective Counsel 5-4
B. Representation of Noncitizens 5-5
C. Assistance in Obtaining Counsel 5-6
1. Legal Orientation Program 5-6
2. Pro Bono 5-6
3. Other Programs and Efforts 5-7
III. Issues Relating to Representation 5-8
A. Scope of the Problem 5-8
B. Barriers to Access 5-8
C. Consequences of Inadequate Representation 5-9
IV. Recommendations Relating to Representation 5-10
A. Implement a Right to Representation 5-11
1. Recognize a Right to Representation in Certain Cases 5-11
2. Extend the Reach of the Legal Orientation Program 5-12
3. Implement a Legal Orientation Program Screening Process 5-13
4. Source of Representatives 5-14
5. Expense to the Government of Representation 5-15
B. Improve Quality of Representation 5-16
1. Punish Attorneys Who Do Not Meet the Code of Conduct 5-16
a. Allow for Contempt Authority 5-16
b. Strictly Enforce Prohibitions Against the Unauthorized Practice of Law 5-17
2. Promote Efforts to Expand Sources of Representatives 5-17
a. Increase the Number of Agencies Recognized by the BIA and Allow Them to Charge More Than a Nominal Fee 5-17
b. Improve Resources for Pro Se Litigants 5-18
c. Expand Pro Bono 5-18
d. Continue Efforts to Maximize Usefulness of the Pro Bono Service Providers List 5-18
APPENDIX OF TABLES — REPRESENTATION 5-19
Table 5-1: Court Proceedings Completed — Percentage of Represented Cases 5-20
Table 5-2: IJ Appeal Decisions — Percentage of Represented Cases 5-20

PART 6: SYSTEM RESTRUCTURING....6-1
I. Introduction on System Restructuring....6-4
A. A Major Change....6-4
B. Goals of Restructuring....6-4
C. The Case for Restructuring....6-4
II. Background on System Restructuring....6-7
A. Differences Between an Article I Court and an Independent Agency....6-7
B. Examples of Article I Courts....6-8
1. Tax Court....6-9
2. Court of Federal Claims....6-10
3. Bankruptcy Courts....6-11
C. Examples of Independent Administrative Agencies for Adjudication....6-12
1. Occupational Safety and Health Review Commission....6-12
2. National Labor Relations Board....6-14
3. Merit Systems Protection Board....6-15
D. Example of Hybrid System: Veterans Appeals....6-17
E. Restructuring Proposals for Immigration Adjudication....6-19
1. Proposals for an Article I Court....6-19
2. Proposals for an Independent Agency....6-21
a. In General....6-21
b. AILA Draft Legislation....6-21
F. Proposals to Have Immigration Judges Be Administrative Law Judges....6-22
III. Evaluation of Options for System Restructuring....6-26
A. Features of Each Option....6-26
1. Article I Court for Entire System....6-26
a. Selection of Judges....6-26
b. Tenure....6-28
c. Removal....6-28
d. Supervision and Evaluation....6-29
e. Discipline....6-29
2. Independent Agency for the Entire System....6-30
a. Selection of Judges....6-30
b. Tenure....6-31
c. Removal....6-32
d. Supervision and Evaluation....6-32
e. Discipline....6-32
3. Hybrid Approach....6-32
a. Article I Appellate Court....6-33
b. Independent Trial Level Agency....6-33

B. Comparative Analysis 6-33
1. Independence 6-34
2. Perceptions of Fairness 6-34
3. Quality of Judges and Professionalism 6-34
4. Efficiency: Relative Cost and Ease of Administration 6-34
5. Accountability 6-34
6. Impact on Article III Courts 6-34
C. Other Considerations 6-35
1. Additional Arguments in Favor of Article I Court 6-35
2. Arguments Against an Article I Court 6-35
IV. Recommendations for System Restructuring 6-35
A. Choice Among Options 6-35
B. Transitional Measures 6-36
Table 6-1: Features of Major Restructuring Systems 6-37
Table 6-2: Comparison of Major Restructuring Options 6-40

APPENDIX 6-A: Other U.S. Adjudication Systems 6A-1
I. Article I Courts 6A-3
A. United States Tax Court 6A-3
B. Court of Federal Claims 6A-5
C. Bankruptcy Courts 6A-7
II. Administrative Agencies for Adjudication 6A-7
A. Occupational Safety and Health Review Commission 6A-7
B. National Labor Relations Board 6A-10
C. Merit Systems Protection Board 6A-13
D. The Social Security Administration 6A-16
III. Hybrid System for Veterans' Appeals 6A-17
A. Structure: Bodies, Members and Procedures 6A-17
1. The Board of Veterans Appeals 6A-18
2. The United States Court of Appeal for Veterans Claims 6A-19
B. Caseload 6A-20
C. Results 6A-21
D. Representation 6A-21
E. Applicability of the Veterans' Benefits Hybrid Model 6A-22
COMMON ACRONYMS AG-1
GLOSSARY OF TERMS AG-3

1

Department of Homeland Security

Reforming the Immigration System

Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases

Prepared by Arnold & Porter LLP for the
American Bar Association Commission on Immigration

American Bar Association
Commission on Immigration
740 Fifteenth Street, NW
Washington, DC 20005-1022
202-662-1005

Part 1: Department of Homeland Security
Table of Contents

I. Introduction on the Department of Homeland Security 1-5
II. Background on the Department of Homeland Security 1-6
A. Basic Terms and Concepts 1-6
B. Structure of the Immigration Function at DHS 1-8
C. Initiation of Removal Proceedings 1-10
1. Removal Proceedings Initiated by USCIS Officers 1-15
a. Credible Fear Determinations by USCIS Asylum Officers 1-15
b. Affirmative Asylum Determinations by USCIS Asylum Officers 1-16
c. Other USCIS Determinations 1-17
2. Removal Proceedings Initiated by CBP Officers 1-18
3. Removal Proceedings Initiated by ICE Officers 1-19
a. Worksite Enforcement 1-20
b. National Fugitive Operations Program 1-21
c. Apprehension by Local Agencies under 287(g) Program 1-22
d. Criminal Alien Program and Secure Communities 1-23
III. Issues Relating to the Department of Homeland Security 1-25
A. DHS Policies and Procedures Increase Case Load Burdens in the Removal Adjudication System 1-25
1. Case Load Burdens and Use of Resources 1-25
2. Insufficient Use of Prosecutorial Discretion 1-26
a. Immigration and Customs Enforcement Officers 1-27
b. Customs and Border Protection Officers 1-27
c. USCIS Officers in the Domestic Operations Directorate 1-27
d. DHS Trial Attorneys 1-28
B. Coordination Problems within DHS Lead to Inconsistent Positions 1-29
C. Removal on the Ground of an Aggravated Felony Conviction Has Expanded to Include Minor Crimes, Burdened the Adjudication System, and Deprived Many Noncitizens of Access to Court Review 1-30
1. Expanded Ground for Removal for an Aggravated Felony Conviction 1-30
a. Consequences of an Aggravated Felony Conviction 1-32
b. Problems Arising from Expansion of Removal on the Ground of an Aggravated Felony Conviction 1-33
2. Administrative Removal Procedures for Non-Lawful Permanent Residents Alleged to be Removable on the Ground of Aggravated Felony Convictions 1-34
D. Removal on the Ground of a Conviction of a Crime Involving Moral Turpitude Has Expanded to Include Misdemeanor Convictions and Has Burdened the Adjudication System 1-37
1. Expanded Scope of Removal on the Ground of a Conviction of a Crime Involving Moral Turpitude 1-38
2. 2008 Revision of the Categorical Approach to Determining Whether a Criminal Conviction is of a Crime Involving Moral Turpitude 1-38

E. Expanded Use of Expedited Removal Proceedings Has Deprived Many Noncitizens of Access to the Immigration Courts 1-40
1. Expanded Use of Expedited Removal 1-41
2. Expedited Removal at Ports of Entry 1-42
3. Expedited Removal within the Interior of the United States 1-43
4. Problems in the Implementation of Expedited Removal 1-44
F. Issues Relating to Adjustments to Lawful Permanent Resident Status 1-46
1. Bars on Admission 1-47
2. Service of Notices to Appear on Persons Eligible for Lawful Permanent Resident Status 1-48
G. Increased Use of Detention Raises Both Efficiency and Fairness Issues 1-49
1. Rapid Growth in Use of Detention 1-50
2. Mandatory Detention 1-52
3. Alternatives to Detention 1-53
4. DHS Parole and Bond Policies 1-56
a. Parole 1-56
b. Release on Bond 1-57
5. Location and Transfers of Detainees 1-57
IV. Recommendations Relating to the Department of Homeland Security 1-59
A. Reduce Burdens and Increase Efficiency in the Removal Adjudication System 1-59
1. Increase the Use of Prosecutorial Discretion to Reduce Unnecessary Removal Proceedings and Litigation 1-60
a. DHS Officer Prosecutorial Discretion 1-60
b. DHS Attorney Prosecutorial Discretion 1-60
2. Give DHS Attorneys Greater Control over the Initiation of Removal Proceedings 1-61
3. To the Extent Possible, Assign Cases to Individual DHS Trial Attorneys 1-61
4. Allow Asylum Officers to Approve Defensive Asylum Claims 1-61
a. Asylum Claims Made in Expedited Removal Cases 1-61
b. Defensive Asylum Claims Made in Removal Proceedings in the Immigration Courts 1-63
c. Authority Required to Implement Recommendations 1-64
5. Cease Issuing Notices to Appear to Noncitizens Prima Facie Eligible to Adjust to Lawful Permanent Resident Status 1-64
B. Implement Mechanisms to Coordinate Immigration Positions and Policies among the Various Components of DHS 1-65
C. Amend Unfair Laws that Burden the Removal Adjudication System 1-65
1. Permit All Noncitizens who are Eligible to Become Legal Permanent Residents to Adjust Their Status in the United States or Eliminate Bars to Reentry 1-65
2. Revise the Definition of Aggravated Felony and Repeal Retroactive Application of the Aggravated Felony Provisions 1-66

3. Revise the Definition of a Crime Involving Moral Turpitude and Reinstate the Application of the Categorical Approach to Moral Turpitude Determinations 1-67
a. Require the Imposition of a Sentence of One Year or More for Removal on the Ground of a Single Conviction of a Crime Involving Moral Turpitude or Require a Potential Sentence of More than One Year....1-67
b. Reinstate the Application of the Categorical Approach to Moral Turpitude Determinations....1-67
D. Reform Administrative and Expedited Removal Proceedings....1-67
1. Prohibit Use of Administrative Removal Proceedings to Remove Minors, the Mentally Ill, Noncitizens who Claim a Fear of Persecution or Torture, and Noncitizens with Significant U.S. Ties....1-68
2. Limit Application of Expedited Removal Proceedings to Certain Types of Individuals....1-69
a. No Application of Expedited Removal Proceedings to Persons within the Interior of the United States....1-69
b. No Application of Expedited Removal Proceedings to Unaccompanied Minors or the Mentally Ill....1-69
3. Limit Expedited Removal Solely to Persons with Improper or Missing Documentation....1-70
4. Improve Supervision of Inspection Process at Ports of Entry and Border Patrol Stations and Make Any Recording of Interviews of Noncitizens during the Inspection Process Available to Such Noncitizens and Their Representatives....1-70
5. Expand Judicial Review of Administrative and Expedited Removal Orders....1-71
a. Administrative Removal Orders on the Ground of Aggravated Felony Convictions....1-71
b. Expedited Removal Orders....1-71
E. Improve Efficiency and Fairness by Revising Detention Policies....1-71
1. When Possible, Exercise Discretion to Refrain from Detaining Persons Not Subject to Mandatory Detention....1-71
2. Improve and Expand Alternatives to Detention and Use Them Only for Persons who Would Otherwise Be Detained....1-72
3. Expand the Use of Parole to Reduce the Detained Population of Asylum Seekers....1-72
4. Increase Controls on the Location and Transfers of Detainees....1-73

Part 1: Department of Homeland Security

1. Introduction on the Department of Homeland Security

Removal proceedings in the immigration courts under section 240 of the Immigration and Nationality Act ("INA") are the primary means by which the United States government expels inadmissible or deportable noncitizens from the United States.[1] Under certain circumstances, a noncitizen may be removed by officers of the Department of Homeland Security ("DHS") pursuant to streamlined administrative removal procedures.[2] Although noncitizens are subject to other types of removal procedures,[3] this Report examines removal proceedings before immigration courts and the streamlined administrative removal procedures before DHS officers, as well as administrative and judicial review (if any) of determinations made and orders issued in such removal proceedings.[4]

A noncitizen is "removable" if he or she is "inadmissible" pursuant to section 212[5] or "deportable" under section 237. The government does not routinely inspect noncitizens after their admission into the country to determine whether they are inadmissible or deportable. Therefore, a noncitizen typically can become subject to removal proceedings when he or she: (1) is apprehended for an alleged violation of U.S. immigration law;[6] or (2) applies for certain immigration benefits, and during the course of adjudicating such application, the U.S. government believes he or she is inadmissible or deportable. Removal proceedings under section 240 do not commence until a written charging document called a Notice to Appear ("NTA") is served on a noncitizen and filed with an immigration court.

DHS serves both an *enforcement function*, in preventing noncitizens from entering the United States illegally and removing noncitizens who succeed in doing so, and a *service function*, by providing services or benefits to facilitate entry, residence, employment, and naturalization of legal immigrants.[7] Therefore, DHS personnel typically make the first contact with, and initiate removal proceedings against, noncitizens.[8]

DHS officers decide certain matters related to removal proceedings. These include, among other things, removal of certain noncitizens in expedited proceedings, denial of affirmative asylum applications or applications for lawful permanent residence status, and applications by detained noncitizens to be released on bond. In addition, pursuant to section 239, a DHS officer initiates a removal proceeding in an immigration court by serving an NTA on a noncitizen and filing this NTA with an immigration court.[9] DHS attorneys also represent the U.S. government in these court proceedings.

This Part 1 of the Report describes the decisions and other actions of DHS officers and attorneys that affect removal adjudications, identifies issues and problems at the DHS level with respect to removal proceedings, and recommends reforms to address these issues.

---

1 In general, pursuant to section 240 of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1229a, noncitizens believed to be "inadmissible" (INA § 212, 8 U.S.C. § 1182) or "deportable" (INA §237, 8 U.S.C. § 1227) are afforded an adjudication of their case, in removal proceedings before immigration courts.

2 *See infra* Sections III.C.2 and III.E.

3 For example: (1) U.S. district court has discretion to enter a removal order at the time of sentencing for a noncitizen who is deportable pursuant to section 237(a)(2)(A) of the INA following a request made by a United States Attorney, with the concurrence of the Department of Homeland Security ("DHS"); and (2) a special removal court consisting of five U.S. district court judges appointed by the Chief Justice of the Supreme Court presides over the removal proceedings of noncitizens alleged to be terrorists deportable under section 237(a)(4)(B) of the INA.

4 Accordingly, all references in this Report to "removal proceedings" are limited in scope to such proceedings.

5 All statutory section references in this Part 1 of the Report are to the INA unless otherwise noted.

6 Noncitizens may be apprehended for alleged immigration violations in a variety of ways, including pursuant to the Criminal Alien Program of Immigration and Customs Enforcement ("ICE"), which identifies removable noncitizens incarcerated in federal, state, and local correctional facilities, with the goal of obtaining removal orders for these noncitizens prior to the completion of their sentences. *See infra* Section II.C.3.d.

7 *See Immigration and Naturalization Service: Overview of Recurring Management Challenges: Hearing Before the Subcomm. on Immigration and Claims, H. Comm. on the Judiciary*, 107th Cong. 9 (2001) (statement of Richard M. Stana, Dir., Justice Issues, U.S. General Accounting Office), *available at* http://www.gao.gov/new.items/d02168t.pdf.

8 *See infra* Section II.C.

9 8 C.F.R. §§ 239.1, 1003.14(a).

II. Background on the Department of Homeland Security

This Section describes the role of DHS in removal proceedings and how such proceedings are initiated.

A. Basic Terms and Concepts

For purposes of U.S. immigration law, there are five general classes of noncitizens:[10]

- noncitizens seeking admission to the United States;[11]
- noncitizens admitted temporarily as non-immigrants;[12]
- noncitizens admitted as asylees or refugees;[13]
- undocumented noncitizens;[14] and
- noncitizens admitted permanently as immigrants (i.e., lawful permanent residents or "LPRs").

Unless entitled to some form of relief from removal, the following groups of noncitizens are removable under the INA: (1) "inadmissible" noncitizens seeking admission to the United States; (2) certain non-immigrants, asylees, and refugees; and (3) undocumented noncitizens. In addition, notwithstanding the fact that LPRs have been admitted into the United States as immigrants and may eventually become U.S. citizens,[15] they are "removable" under certain circumstances.[16]

During removal proceedings pursuant to section 240, a noncitizen may apply for relief from removal. Forms of such relief include (without limitation):

- asylum under section 208;[17]

10 The term "noncitizen," as used in this Report, has the same meaning as "alien" under the INA. The INA defines an "alien" as any person who is not a citizen or national of the United States. INA § 101(a)(3), 8 U.S.C. § 1101(a)(3).

11 "Admission" means a noncitizen's lawful entry into the United States after inspection and authorization by an immigration officer. INA § 101(a)(13), 8 U.S.C. § 1101(a)(13). A noncitizen seeking to gain lawful status in the United States by applying for lawful permanent residency or for an immigrant or non-immigrant visa, whether the person is located inside or outside the United States, is seeking admission for purposes of the INA. INA § 245(a), 8 U.S.C. § 1255(a) (application for the adjustment of status to lawful permanent resident); INA § 222, 8 U.S.C. § 1202 (application for an immigrant or non-immigrant visa at a U.S. consulate).

12 Under U.S. immigration law, non-immigrants are noncitizens admitted into the United States for a designated period of time and for a specific purpose pursuant to a non-immigrant visa. Examples of non-immigrants include tourists, diplomats, noncitizen students and noncitizen workers. The federal government requires that noncitizen applicants for most non-immigrant visas prove that they are not coming to the United States to live permanently. *See* INA § 214(b), 8 U.S.C. § 1184(b).

13 *See infra* Section II.C.1.b. Subject to applicable inadmissibility bars, an asylee is entitled to adjust his or her status to a U.S. lawful permanent resident ("LPR") after being physically present in the United States for one year after his or her asylum grant date. INA § 209(b), 8 U.S.C. § 1159(b). Subject to the applicable inadmissibility bars, a refugee is also entitled to adjust his or her status to LPR after being physically present in the United States for one year after admission as a refugee. INA § 209(a)(1), 8 U.S.C. § 1159(a)(1).

14 "Undocumented" noncitizens (sometimes referred to as "illegal noncitizens" or "out-of-status" noncitizens) are individuals present in the United States without authorization under the INA. Examples include persons who entered the United States without inspection by a CBP officer at a port of entry and noncitizens who have overstayed their non-immigrant visas. A noncitizen may be both "undocumented" and entitled to legalize his or her immigration status. For example, if a noncitizen present in the United States on a temporary specialty occupation work visa is laid off from employment but married to a U.S. citizen, DHS considers this noncitizen to be "out of status" as of the date of termination of his employment, notwithstanding the fact that the person is entitled to adjust to LPR status. *See* INA §§ 201(b)(2)(A)(i), 245(c), 8 U.S.C. §§ 1151(b)(2)(A)(i), 1255(c).

15 Except for participants in the Military Accessions Vital to the National Interest pilot program (the "MAVNI program"), U.S. citizenship is available only to noncitizens who are LPRs. INA § 318, 8 U.S.C. § 1429. Pursuant to the MAVNI program, which launched on February 23, 2009 and is scheduled to expire on December 31, 2009, certain noncitizens who enlist in the U.S. military may apply immediately for U.S. citizenship without first obtaining LPR status. *See* U.S. Army, *Today's Focus: Military Accessions Vital to the National Interest Pilot Recruiting Program*, STAND TO!, Mar. 10, 2009, http://www.army.mil/standto/archive/2009/03/10/; *see also* INA § 329, 8 U.S.C. § 1440; Expedited Naturalization of Aliens and Noncitizen Nationals Serving in an Active-Duty Status During the War on Terrorism, Exec. Order No. 13269, 67 Fed. Reg. 45287 (July 8, 2002).

16 U.S. citizens are not removable under the INA. However, they may be involuntarily expatriated, which causes such individuals to become "noncitizens" under the INA subject to removal proceedings. INA § 349, 8 U.S.C. § 1481 (involuntary expatriation); Vance v. Terrazas, 444 U.S. 252, 266-67 (1980) (holding that the federal government may expatriate a U.S. citizen if it establishes, by a preponderance of the evidence, that a citizen has voluntarily and knowingly renounced or abandoned his or her citizenship). In addition, denaturalization or revocation of the citizenship of naturalized U.S. citizens is authorized pursuant to section 340(a), 8 U.S.C. § 1451(a), if "naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation."

17 *See infra* Section II.C.1.b.

- withholding of removal under section 241(b)(3);[18]
- withholding or deferral of removal under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT");[19]
- cancellation of removal under section 240A;[20]
- suspension of deportation pursuant to former section 212(c);[21]
- adjustment to LPR status under section 245;[22]
- adjustment to LPR status by registry under section 249;[23]
- voluntary departure under section 240B;[24] and
- naturalization under section 318 of the INA.[25]

A noncitizen may eventually seek U.S. citizenship if granted relief from removal on one of the grounds

---

18 When a noncitizen applies for asylum in removal proceedings, he or she also applies for withholding of removal under section 241(b)(3). *See* 8 C.F.R. § 208.16(a). Unlike asylum, which is a discretionary form of relief, withholding of removal is a mandatory protection that an immigration judge must grant if the judge finds that the applicant has a clear probability of persecution in his or her country of origin due to his or her race, religion, nationality, membership in a particular social group, or political opinion. 8 C.F.R. § 208.16(d)(1). A noncitizen generally cannot receive asylum or withholding of removal if he or she, among other things: (1) persecuted another person on account of the person's social or political group membership; (2) committed a particularly serious crime, making him or her a threat to the community; or (3) is a danger to the security of the United States. 8 C.F.R. § 208.16(d)(2), (3); *In re* S-S-, 22 I. & N. Dec. 458 (BIA 1999), *overruled by In re* A-G-, 23 I. & N. Dec. 270 (BIA 2002).

19 The United States acceded to CAT in 1994 and enacted legislation in 1998 to execute Article 3 of CAT, which provides, in relevant part, that "[n]o State Party shall expel, return . . . or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." *See* Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105–277, div. G, subdiv. B, title XXII, § 2242, 112 Stat. 2681-822 (codified at 8 U.S.C. § 1231 note). An applicant for protection under CAT must prove that it is more likely than not that he or she would be tortured if removed to a particular country. Protection under CAT is mandatory if the applicant is eligible.

20 Cancellation of removal is a discretionary remedy available to LPRs and other noncitizens who have maintained at least seven years (in the case of LPRs) or ten years (in the case of other noncitizens) of continuous residence in the United States and satisfied other applicable conditions. If a noncitizen is granted cancellation of removal, his or her status is automatically adjusted to that of a lawful permanent resident. This remedy is not available to noncitizens convicted of aggravated felonies or to non-LPRs convicted of crimes involving moral turpitude.

21 The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, 110 Stat. 1214 ("AEDPA"), limited the applicability of relief from removal provided by former section 212(c). The Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, 110 Stat. 3009-546 ("IIRIRA"), repealed section 212(c), effective April 1, 1997, and replaced it with cancellation of removal for LPRs under section 240A. LPRs with criminal convictions obtained by plea agreements predating these statutory changes may apply for relief pursuant to former section 212(c), and some circuit courts have ruled that noncitizens with criminal convictions obtained after trial predating these statutory changes may apply for this form of relief. *See* INS v. St. Cyr, 533 U.S. 289, 326 (2001). *Compare* Atkinson v. Attorney General, 479 F.3d 222, 230-31 (3d Cir. 2007) (holding that a noncitizen convicted following a jury trial may apply for a waiver under former section 212(c) because IIRIRA's repeal of section 212(c) cannot be applied retroactively), *with* Montenegro v. Ashcroft, 355 F.3d 1035, 1037 (7th Cir. 2004) (holding that *St. Cyr* does not apply to noncitizens convicted following a trial because they "did not abandon any rights or admit guilt in reliance on continued eligibility for § 212(c) relief"). Similar to cancellation of removal pursuant to section 240A, relief under former section 212(c) is a discretionary waiver available to LPRs with at least seven years of continuous residence in the United States. Conviction for an aggravated felony as to which the noncitizen has served five years in prison is a bar to relief under former section 212(c).

22 A noncitizen who is in removal proceedings may apply to the immigration judge to adjust his or her status to that of an LPR pursuant to section 245. An immigration judge may, in the judge's discretion, grant such an application if the noncitizen is admissible, the applicable immigrant visa is immediately available, and there are no bars to this relief. *See infra* Section III.F.

23 This is a discretionary form of relief that may be granted by an immigration judge during removal proceedings. A noncitizen is eligible for this form of relief if he or she: (1) entered the United States prior to January 1, 1972; (2) has continuously resided here since entry; (3) has good moral character; (4) is neither ineligible for citizenship nor inadmissible because of participation in terrorist activities, certain criminal or security grounds, or for noncitizen smuggling; and (5) never participated in Nazi persecutions or genocide. INA § 249, 8 U.S.C. § 1259.

24 This is a discretionary form of relief that may be granted by DHS or an immigration judge only to a noncitizen who has been physically present in the United States for at least one year and is not subject to a mandatory bar (e.g., conviction for an aggravated felony). The advantages of this form of relief are: (1) a noncitizen who departs voluntarily from the United States within the time granted is not barred from reentry; and (2) because a voluntary departure order is not a removal order, such noncitizen is not subject to a reinstatement of removal if he or she returns to the United States unlawfully. The failure to depart under a grant of voluntary departure causes the applicable noncitizen to be ineligible for ten years for: (1) cancellation of removal under section 240A; (2) adjustment of status under section 245; (3) change of non-immigrant status under section 248; and (4) registry under section 249. Although voluntary departure is not available to an arriving noncitizen, INA § 240B(a)(4), 8 U.S.C. § 1229c(a)(4), DHS or an immigration judge may allow the person to withdraw his or her admission application under INA § 235(a)(4), 8 U.S.C. § 1225(a)(4).

25 Although section 318, 8 U.S.C. § 1429, prohibits an immigration judge from adjudicating a naturalization application during removal proceedings, the judge may terminate such proceedings to permit a noncitizen to pursue a naturalization application before U.S. Citizenship and Immigration Services ("USCIS"), *provided* that: (1) the person has established prima facie eligibility for naturalization; and (2) the matter involves exceptionally appealing or humanitarian factors. 8 C.F.R. § 1239.2(f).

listed above, except for withholding of removal under section 241(b)(3), withholding or deferral of removal under CAT, and voluntary departure.

Although the list above includes the most commonly requested forms of relief in removal proceedings, it is not exhaustive.[26] In light of the number and variety of possible forms of relief from removal and the complexity of U.S. immigration law, practitioners uniformly recommend that a noncitizen subject to removal proceedings should seek legal counsel.[27]

Asylum is the most commonly sought and granted form of relief in removal proceedings before immigration courts. Grants of asylum in fiscal years 2004 through 2008[28] accounted for 39.7% of the relief from removal granted in completed removal proceedings.[29] The next largest type of relief granted in completed removal proceedings is adjustment to LPR status pursuant to section 245, which represented an average of 28.7% of the relief from removal granted in completed removal proceedings annually in fiscal years 2004 through 2008.[30]

B. Structure of the Immigration Function at DHS

DHS is a cabinet-level agency[31] with the stated goals of, among others, preventing terrorist attacks within the United States and reducing the vulnerability of the United States to terrorism.[32] DHS performs the immigration benefit services and immigration enforcement[33] functions of the U.S. government through three components:

- U.S. Citizenship and Immigration Services ("USCIS");
- Customs and Border Protection ("CBP"); and
- Immigration and Customs Enforcement ("ICE").[34]

USCIS is responsible for immigration benefit services, including the determination of visa petitions, affirmative asylum applications, applications by individuals not in removal proceedings to adjust their immigration status, and naturalization applications.[35] CBP performs enforcement functions at U.S. borders

---

26 For example, certain nationals of Eastern Europe, Guatemala, and El Salvador may seek relief from removal pursuant to the Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105–100, 111 Stat. 2160 (1997), *amended* by Pub. L. No. 105–139, 111 Stat. 2644 (1997) (codified at 8 U.S.C. § 1101 note), and cancellation of removal is available under the Violence Against Women Act, INA § 204(a), 8 U.S.C. § 1154(a).

27 *See, e.g.*, Stephen Yale-Loehr & Lindsay Schoonmaker, *Overview of U.S. Immigration Law*, in Basic Immigration Law 2009 73, 94 (2009).

28 For purposes of this Report, a fiscal year refers to the fiscal year of the federal government, which runs from October 1 to September 30.

29 Executive Office for Immigration Review, Dep't of Justice, FY 2008 Statistical Year Book D2, K4 (2009), *available at* http://www.usdoj.gov/eoir/statspub/fy08syb.pdf [hereinafter EOIR FY2008 Statistical Year Book]. EOIR reported that in fiscal years 2004, 2005, 2006, 2007, and 2008, asylum applications were made in 68,120, 66,310, 60,395, 57,868, 55,786, and 46,237 completed removal proceedings, respectively, and represented approximately 76.0%, 75.0%, 70.8%, 72.7%, and 67.8%, respectively, of all completed removal proceedings in which applications for relief were made. *Id*. at I2, N1.

30 *Id*. at D2, R3.

31 Austin T. Fragomen & Steven C. Bell, Immigration Fundamentals: A Guide to Law and Practice 1-19 (2009). DHS was created on January 24, 2003 pursuant to the Homeland Security Act of 2002, Pub. L. No. 107–296, 116 Stat. 2135 ("HSA"), in the wake of the September 11 terrorist attacks. DHS absorbed a myriad of functions related to border and homeland security that had been scattered among 22 federal agencies, including the Immigration and Naturalization Service ("INS") in which the federal government's immigration function was housed. *Id*. at 1-18; Nat'l Immigration Forum, Backgrounder: Immigration under the Department of Homeland Security 1 (2003), *available at* http://www.immigrationforum.org/images/uploads/ImmigrationandDHS.pdf. As called for by the HSA, on March 1, 2003, INS was formally abolished and all of its operations were transferred to components of DHS. *See* Fragomen & Bell, *supra*, at 1-20.

32 Fragomen & Bell, *supra* note 31, at 1-19.

33 Immigration enforcement is the regulation of those who violate the INA, including the civil provisions of the INA (e.g., noncitizens who enter without inspection or violate the conditions of their admittance), as well as its criminal provisions (e.g., marriage fraud or noncitizen smuggling). Alison Siskin, et al., Congressional Research Service, Report RL33351, Immigration Enforcement within the United States CRS-3 (2006) [hereinafter CRS Immigration Enforcement].

34 The U.S. Coast Guard also enforces U.S. immigration law by interdicting migrants at sea, most of whom are Cubans or Haitians, and returning them to their country of origin or departure. *See* U.S. Coast Guard, Alien Migrant Interdiction, http://www.uscg.mil/hq/cg5/cg531/amio.asp (last modified Apr. 20, 2009).

35 Although USCIS houses the benefits services portion of the federal government's immigration function, it is primarily focused on national security concerns and enforcement. According to the USCIS Strategic Plan, its first goal is to "[s]trengthen the security and integrity of the immigration system," while its second goal is to "[p]rovide effective customer-oriented immigration benefit and information services." U.S. Citizenship & Immigration Servs., USCIS Strategic Plan 2008-2012, at 20-28 (2007), *available at* http://www.uscis.gov/files/nativedocuments/USCIS_Strategic_Plan_2008-2012.pdf.

and ports of entry.[36] ICE is responsible for immigration enforcement functions in the interior of the United States — investigations, intelligence, detention, and removal.[37] Within ICE, responsibility for investigations and intelligence is vested in ICE's Office of Investigations ("OI") and Office of Intelligence, respectively.[38] OI officers housed in ICE address, among other enforcement issues, smuggling and trafficking in noncitizens, benefit fraud, community complaints of illegal immigration, and worksite enforcement.[39] Responsibility for detention and removal is placed in ICE's Office of Detention and Removal ("DRO").[40] In addition, DRO officers are tasked with identifying and removing criminal noncitizens and "ICE fugitives" (i.e., noncitizens who have failed to leave the United States after receiving a final order of removal).[41] ICE's Office of State and Local Coordination is responsible for coordinating immigration enforcement activities with state and local law enforcement agencies.[42]

Each of USCIS, CBP, and ICE plays a significant role in the removal of noncitizens in the U.S. immigration adjudication system:

- First, CBP and ICE officers may order the removal of certain noncitizens, and these removal orders are subject to limited judicial review.[43]
- Second, asylum officers housed in USCIS decide affirmative asylum applications of noncitizens that, if granted, enable them to remain in the United States and to apply to become LPRs and eventually U.S. citizens.[44]
- Third, USCIS, CBP, and ICE officers initiate removal proceedings in immigration courts pursuant to section 240 by serving NTAs on noncitizens believed to be removable (and may grant voluntary departure).[45]
- Fourth, ICE attorneys prosecute removal proceedings in immigration courts pursuant to section 240.[46]
- Finally, ICE officers (and sometimes CBP officers) make decisions regarding the detention of noncitizens and are responsible for the removal of noncitizens subject to a removal order.[47]

In short, DHS personnel (including officers in the field) make important *and difficult* decisions on a daily basis in connection with the removal of noncitizens. These decisions have material effects on noncitizens and their families.

Each of the three DHS components — USCIS, CBP, and ICE — obtains legal advice and support for these functions from its own legal staff, who are subject

---

36 INS's border enforcement functions and border patrol agents were incorporated into CBP, which also absorbed the U.S. Customs inspection program. *See Department of Homeland Security: Addressing Management Challenges That Face Immigration Enforcement Agencies, Hearing Before the Subcomm. on Immigration, Border Security, and Claims, H. Comm. on the Judiciary*, 109th Cong. 4-5 (2005) (statement of Richard M. Stana, Dir., Homeland Security and Justice Issues, U.S. Gov't Accountability Office), *available at* http://www.gao.gov/new.items/d05664t.pdf. After September 11, 2001, the focus shifted from preventing undocumented noncitizens from entering the country to preventing the entry of terrorists and weapons of mass destruction. *See* CRS Immigration Enforcement, *supra* note 33, at CRS-8. According to the CBP, it has been "charged with the priority mission of preventing terrorists and terrorist weapons from entering the United States, while also facilitating the flow of legitimate trade and travel." U.S. Customs & Border Prot., Performance and Accountability Report: Fiscal Year 2008, at 6 (2008), *available at* http://www.cbp.gov/linkhandler/cgov/newsroom/publications/admin/par_fy08_pub.ctt/par_fy08.pdf.

37 ICE's mission is "to target the people, money and materials that support criminal organizations and terrorist networks who threaten our country in the 21st century." U.S. Immigration & Customs Enforcement, ICE Fiscal Year 2008 Annual Report: Protecting National Security and Upholding Public Safety 1 (2009) [hereinafter ICE Fiscal Year 2008 Annual Report], *available at* http://www.ice.gov/doclib/pi/reports/ice_annual_report/pdf/ice08ar_final.pdf.

38 *See infra* Section II.C.3.a.

39 *See* CRS Immigration Enforcement, *supra* note 33, at CRS-7; *see also* U.S. Immigration & Customs Enforcement, Office of Investigations – About Us, http://www.ice.gov/investigations/ (last modified Sept. 28, 2009).

40 *See infra* Section III.G.

41 *See infra* Sections II.C.3.b and II.C.3.d.

42 *See infra* Section II.C.3.c.

43 *See infra* Sections III.C.2 and III.E.

44 *See infra* Section II.C.1.b.

45 *See infra* Section II.C.

46 *See infra* Section III.A.2.d.

47 *See infra* Section III.G.

to oversight by DHS's Office of the General Counsel.[48] In addition to providing legal advice and support to other DHS personnel in their respective DHS components, DHS immigration attorneys prepare legal opinions and represent the federal government in immigration-related litigation. ICE attorneys in the Office of the Principal Legal Advisor prosecute removal proceedings in the immigration courts.[49] USCIS trial attorneys represent USCIS in visa petition proceedings before the Executive Office for Immigration Review,[50] and CBP attorneys support the Department of Justice ("DOJ") in civil or criminal judicial actions involving CBP.[51] ICE and CBP attorneys also participate in immigration-related proceedings in the federal courts.[52]

The DHS General Counsel reports directly to the DHS Secretary[53] and serves as the "chief legal officer" of the department.[54] The office is composed of all lawyers at its headquarters and its operating components.[55] The General Counsel is ultimately responsible for all legal determinations and for overseeing all DHS attorneys.[56] In addition, in this role as chief legal officer, the General Counsel serves as DHS's regulatory policy officer, supervising the rulemaking program of DHS and making sure that all DHS regulatory actions are in compliance with applicable statutes and executive orders.[57]

Under the Office of the General Counsel are several headquarters divisions, each headed by an associate general counsel. These include an Immigration and Enforcement Division, the chief counsel of USCIS, the Office of the Principal Legal Advisor of ICE ("OPLA"), and the chief counsel of CBP.[58] These officials report not only to the DHS General Counsel, but also to the heads of their respective DHS components (USCIS,[59] ICE,[60] and CBP[61]).

C. Initiation of Removal Proceedings

Generally, a noncitizen may become subject to removal proceedings if he or she: (1) applies for immigration benefits with USCIS; (2) is inspected by a CBP immigration officer at a port of entry, such as an airport; (3) is apprehended at the border by CBP officers or inside the United States by ICE officers or local law enforcement officers supervised by ICE; or (4) is arrested or incarcerated in the United States and identified as a noncitizen by DHS.

A USCIS, CBP, or ICE officer who believes that an individual is removable may initiate a removal proceeding in an immigration court pursuant to section 240 by serving an NTA on the noncitizen and filing the NTA with such immigration court.[62]

---

48 U.S. Dep't of Homeland Sec., Office of the General Counsel, http://www.dhs.gov/xabout/structure/gc_1193248570775.shtm (last modified Sept. 4, 2009).

49 *See infra* Section III.A.2.d.

50 U.S. Citizenship & Immigration Servs., Annual Report for Fiscal Year 2008, at 51 (2009), *available at* http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=d7632c3dcfb79110VgnVCM1000004718190aRCRD&vgnextchannel=d7632c3dcfb79110VgnVCM1000004718190aRCRD.

51 U.S. Gov't Accountability Office, DHS Immigration Attorneys: Workload Analysis and Workforce Planning Efforts Lack Data and Documentation 2 (2007), *available at* http://www.gao.gov/new.items/d07206.pdf.

52 *See* John Grasty Crews, II, *The Executive Office for United States Attorneys' Involvement in Immigration Law Enforcement*, 56 Immigr. Legal Initiatives 1, 3 (2008), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usab5606.pdf.

53 *See* U.S. Dep't of Homeland Sec., Organizational Chart, http://www.dhs.gov/xabout/structure/editorial_0644.shtm (last modified Sept. 29, 2008).

54 HSA § 103(a)(9), 116 Stat. at 2144; 6 U.S.C. § 113(a)(10).

55 *See* U.S. Dep't of Homeland Sec., Office of the General Counsel, http://www.dhs.gov/xabout/structure/gc_1193248570775.shtm (last modified Sept. 4, 2009).

56 *Id.*

57 *Id.*

58 *Id.*

59 U.S. Citizenship & Immigration Servs., USCIS Organizational Chart, http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=476fcf021c599110VgnVCM1000004718190aRCRD&vgnextchannel=2af29c7755cb9010VgnVCM10000045f3d6a1RCRD (last modified Sept. 12, 2009).

60 U.S. Immigration & Customs Enforcement, Leadership, http://www.ice.gov/about/leadership/index.htm (last modified Nov. 20, 2009).

61 U.S. Customs & Border Prot., CBP Organizational Chart (Dec. 3, 2009), http://www.cbp.gov/linkhandler/cgov/about/organization/orgcha1.ctt/orgcha1.pdf.

62 INA § 239, 8 U.S.C. 1229; 8 C.F.R. § 239.1.

Thereafter, any USCIS, CBP, or ICE officer, or any ICE attorney, may move for dismissal of the removal proceeding.[63]

The number of removal proceedings received by the immigration courts per fiscal year increased approximately 14% from 249,839 in fiscal year 2004 to 285,178 in fiscal year 2008,[64] which suggests that the number of NTAs issued per fiscal year increased over the same period. Because DHS does not publicly report the number of NTAs issued per fiscal year by its programs, we reviewed publicly reported data on apprehensions of deportable noncitizens by CBP and ICE for fiscal years 2004 through 2008, which are summarized in the following table:[65]

DHS PROGRAM	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
CBP – Border Patrol					
Southwest sector	1,139,282	1,171,428	1,072,018	858,722	705,022
Percentage of total number of deportable noncitizens apprehended by Border Patrol	98.2%	98.5%	98.4%	97.9%	97.4%
Other sectors	21,113	17,680	17,118	18,065	18,818
Total	1,160,395	1,189,108	1,089,136	876,787	723,840
Percentage of total number of deportable noncitizens apprehended	91.8%	92.1%	90.3%	91.3%	91.4%
ICE – Office of Investigations (1)(2)	103,837	102,034	101,854	53,562	33,573
Worksite enforcement (3)	685	1,116	3,667	4,077	5,184
ICE – Office of Detention and Removal (4)	–	–	15,467	30,407	34,155
Total	1,264,232	1,291,142	1,206,457	960,756	791,568

(1) The number of apprehensions reported in fiscal year 2008 does not include arrests under ICE's 287(g) program.

(2) Beginning in fiscal year 2007, the number of apprehensions reported no longer included apprehensions under ICE's Criminal Alien Program.

(3) Number of administrative arrests for immigration violations during worksite enforcement actions. U.S. Immigration & Customs Enforcement, Office of Investigations – Worksite Enforcement Overview, http://www.ice.gov/pi/news/factsheets/worksite.htm (last modified Apr. 30, 2009).

(4) Discloses arrests of noncitizens under ICE's National Fugitive Operations Program. Does not include NTAs issued under ICE's Criminal Alien Program, which was transferred from ICE's Office of Investigations to ICE's Detention and Removal Office in June 2007. *See infra* Section II.C.3.d.

63 8 C.F.R. § 239.2(c).

64 EOIR FY2008 Statistical Year Book, *supra* note 29, at C3.

65 *See generally* Office of Immigration Statistics, U.S. Dep't of Homeland Sec., 2008 Yearbook of Immigration Statistics 93-94 (2009), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2008/ois_yb_2008.pdf; Office of Immigration Statistics, U.S. Dep't of Homeland Sec., Immigration Enforcement Actions: 2008, at 2-3 (2009) [hereinafter DHS 2008 Enforcement Actions], *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_08.pdf.

Such data are an imperfect proxy for data on the number of NTAs issued because, among other things: (1) such data relate to events rather than individuals; (2) they exclude NTAs issued under ICE's Criminal Alien Program and 287(g) program, as well as NTAs issued by USCIS; and (3) apprehensions can be disposed of in ways other than by the initiation of removal proceedings by the issuance of NTAs (e.g., expedited removal and administrative removal proceedings and voluntary departures).[66] Accordingly, on May 14, 2009, we submitted to DHS a written request for the number of NTAs issued by DHS for each of the past five fiscal years, including the number of NTAs issued by each of USCIS, CBP, and ICE and by each of their respective programs and operations. On November 18, 2009, we received from DHS the requested data, which are included in the table below:

Continued on page 1-15

DHS COMPONENT	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
USCIS						
Asylum						
Number of NTAs issued (1)(2)	Not available	Not available	32,008	39,364	30,212	23,696(3)
Number of affirmative asylum cases referred to immigration courts (4)	39,259	35,869	37,020	40,126	33,392	Not available
Affirmative asylum cases referred to immigration courts, less asylum-issued NTAs (5)	Not available	Not available	5,012	762	3,180	Not available
Domestic Operations – Number of NTAs issued (1)(6)	Not available	Not available	Not available	Not available	22,947	29,489(3)
***Number of NTAs issued by USCIS* (1)(2)**	**39,259**	**35,869**	**32,008**	**39,364**	**53,159**	**53,185(3)**
Percentage of total number of NTAs issued (7)	25.5%	13.4%	15.0%	16.1%	18.3%	24.0%
CBP (1)						
Office of Field Operations – Number of NTAs issued (8)	20,267	22,811	24,148	24,864	22,368	Not available
Office of the Border Patrol – Number of NTAs issued (9)	94,140	166,969	92,360	43,350	36,184	Not available
***Number of NTAs issued by CBP* (1)**	**114,407**	**189,780**	**116,508**	**68,214**	**58,552**	**Not available**
Percentage of total number of NTAs issued (7)	74.5%	70.4%	54.5%	27.9%	20.1%	Not available

Table continued on page 1-13

66 *See* DHS 2008 ENFORCEMENT ACTIONS, *supra* note 65, at 2-3.

Table continued from page 1-12

DHS COMPONENT	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
ICE (10)						
Office of Detention and Removal						
Fugitive Operations – Number of NTAs issued (11)	Not provided	1,779	4,145	8,885	5,971	5,903
Criminal Alien Program – Number of NTAs issued (11)(12)	–	–	–	74,008	123,670	113,367
Percentage of NTAs issued by ICE	–	–	–	54.2%	68.9%	67.4%
Office of Investigations –Number of NTAs issued (11)(13)	Not provided	42,236	55,427	38,512	26,466	16,775
Office of State and Local Coordination – 287(g) program – Number of NTAs issued	Not provided	–	5,799	15,187	23,429	32,254
***Number of NTAs issued by ICE* (10)**	**Not available**	**44,015**	**65,371**	**136,592**	**179,536**	**168,299**
Percentage of total number of NTAs issued (7)	Not available	16.3%	30.6%	55.9%	61.7%	76.0%
***Number of charging documents issued against noncitizens in U.S. prisons* (14)**	**Not available**	**Not available**	**67,850**	**164,296**	**221,085**	**Not available**
Percentage of total number of NTAs, adjusted (15)	Not available	Not available	31.4%	60.4%	66.4%	Not available
All DHS Components						
Number of NTAs issued (16)	153,666	269,664	213,887	244,170	291,217	221,484
Number of NTAs issued, adjusted (17)	153,166	269,664	216,366	271,874	332,796	221,484

(1) Data provided by the Office of Immigration Statistics, U.S. Department of Homeland Security in November 2009 (on file with the American Bar Association Commission on Immigration) ("OIS Data").

(2) Excludes NTAs issued in connection with credible fear interviews and denials of applications for relief under the Nicaraguan Adjustment and Central American Relief Act ("NACARA"). In the OIS Data, the numbers of NTAs issued by USCIS's Asylum Division for fiscal years 2004 and 2005 were reportedly not available.

(3) For the stub period from October 1, 2008 to August 31, 2009.

(4) Office of Planning, Analysis, & Technology, Executive Office for Immigration Review, Dep't of Justice, FY 2008 Statistical Year Book I1 (2009), *available at* http://www.usdoj.gov/eoir/statspub/fy08syb.pdf.

Continued on page 1-14

Continued from page 1-13

(5) Represents the difference between the number of affirmative asylum cases referred to the immigration courts in the applicable fiscal year reported by EOIR in its FY 2008 Statistical Year Book and the number of NTAs issued by USCIS's Asylum Division in such fiscal year reported in the OIS Data. These differences may arise from the lag in time between a DHS officer issuing an NTA and the filing of such NTA with the applicable immigration court.

(6) USCIS's Domestic Operations Directorate ("DOD") manages the processing and adjudication of benefit applications submitted to USCIS (other than asylum applications and other benefit applications that are the responsibility of USCIS's Refugee, Asylum and International Operations Directorate). *See* U.S. Citizenship & Immigration Servs., Annual Report for Fiscal Year 2008 56, 64 (2009).

In the OIS Data, it was reported that USCIS did not collect the number of NTAs issued by DOD for any of fiscal years 2005, 2006, and 2007. The number of NTAs issued annually by DOD, however, prior to fiscal year 2007 is unlikely to have been significant. In 2007, the USCIS Ombudsman noted that the number of NTAs issued by USCIS had increased over the years and that USCIS issued 6,969, 10,008, and 13,350 NTAs for the 12-month periods ended March 2005, March 2006, and March 2007, respectively. U.S. Citizenship & Immigration Services Ombudsman, 2007 Annual Report to Congress 96 (June 11, 2007), *available at* http://www.dhs.gov/xlibrary/assets/CISOMB_Annual_Report_2007.pdf.

(7) Represents the percentage resulting from the division of the total number of NTAs issued by the applicable DHS component in the applicable fiscal year by the total number of NTAs issued by all DHS components. The calculation of the total number of NTAs issued by all DHS components in any fiscal year is described below in note (16).

(8) CBP's Office of Field Operations is responsible for operations at ports of entry. *See* U.S. Customs & Border Protection, Office of Field Operations – Assistant Commissioner, Thomas S. Winkowski, http://www.cbp.gov/xp/cgov/about/organization/assist_comm_off/field_operations.xml.

(9) CBP's Office of Border Patrol is responsible for enforcing immigration laws between official ports of entry. *See* U.S. Customs & Border Protection, Assistant Commissioners' Offices, http://www.cbp.gov/xp/cgov/about/organization/assist_comm_off/.

(10) Data provided by the Office of Policy, Immigration and Customs Enforcement, in November 2009 (on file with the American Bar Association Commission on Immigration) (the "ICE Data").

(11) The ICE Data with respect to the Office of Detention and Removal – Fugitive Operations, the Office of Detention and Removal – Criminal Alien Program and the Office of Investigations reportedly represent data from a "snap shot" of the data in the respective ICE Law Enforcement System ("LES") at the time the ICE Data were compiled, and the data within LES may be modified at any time by authorized ICE personnel, which could result in a change in the data reported.

(12) The ICE Data for ICE's Criminal Alien Program ("CAP") are subject to the following: (i) guidelines to effectively track statistics for CAP-related NTAs issued did not exist for ICE's Office of Detention and Removal prior to 2007; (ii) CAP can only currently run data for fiscal years 2008 and 2009 to determine the number of NTAs issued pursuant to CAP; and (iii) the CAP-related NTA data were obtained by filtering the total number of NTAs in the CAP apprehension report for each fiscal year to provide only NTAs issued pursuant to CAP. Because CAP began in June of 2007, ICE officers did not issue NTAs pursuant to CAP in fiscal years 2005 and 2006, and the number of NTAs issued in fiscal year 2007 under CAP covers the period from June 2007 to September 30, 2007.

(13) Includes NTAs issued in connection with ICE's worksite enforcement.

(14) U.S. Immigration & Customs Enforcement, ICE Fiscal Year 2008 Annual Report: Protecting National Security and Upholding Public Safety 3 (2009), *available at* http://www.ice.gov/doclib/pi/reports/ice_annual_report/pdf/ice08ar_final.pdf.

(15) Represents the percentage resulting from the division of the total number of NTAs issued by the applicable DHS component in the applicable fiscal year by the total number of NTAs issued by all DHS components, adjusted. The calculation of the total number of NTAs issued by all DHS components, adjusted in any fiscal year is described below in note (17).

(16) The total number of NTAs issued by all DHS components in any fiscal year equals the sum of: (i) the number of NTAs issued by USCIS reported in the OIS Data; (ii) because the number of NTAs issued by USCIS's Asylum Division in each of fiscal years 2004 and 2005 is not included in the OIS Data (*see* note (2) above), only for fiscal years 2004 and 2005, the number of affirmative asylum cases referred to the immigration courts in such fiscal year (*see* note (4) above); (iii) the number of NTAs issued by CBP reported in the OIS Data; and (iv) the number of NTAs issued by ICE reported in the ICE Data.

(17) The total number of NTAs issued by all DHS components, adjusted, in any fiscal year is calculated in accordance with note (16) above, and adjusted to include the number of charging documents issued against noncitizens in U.S. prisons, in place of the number of NTAs issued by ICE reported in the ICE Data, for each of fiscal years 2006, 2007, and 2008. *See* note (14) above.

Continued from page 1-12

Based in part on the data set forth above, we observed the following trends in the issuance of NTAs:[67]

- *Increase in the number of NTAs issued by USCIS Service Centers*. The number of NTAs issued by the USCIS Domestic Operations Directorate increased since the issuance of a USCIS policy memorandum in 2006.[68] In fiscal year 2006, the number of NTAs issued by USCIS's Asylum Division and Domestic Operations Directorate represented approximately 15.0% of the NTAs issued by DHS; in fiscal year 2008, they represented approximately 18.3% of the NTAs issued by DHS.
- *Significant decrease in the number of NTAs issued by CBP's Border Patrol*. While the number of apprehensions by CBP's Border Patrol declined approximately 38.1% from 1,139,282 in fiscal year 2004 to 705,022 in fiscal year 2008, the number of NTAs issued by CBP's Border Patrol declined approximately 61.6% from 94,140 in fiscal year 2004 to 36,184 in fiscal year 2008. In fiscal year 2006, NTAs issued by CBP's Border Patrol and Office of Field Operations represented approximately 54.5% of the NTAs issued by DHS; in fiscal year 2008, they represented approximately 20.1% of the NTAs issued by DHS.[69]
- *Significant growth in the number of NTAs issued by ICE.* The number of NTAs issued by ICE nearly quadrupled, from 44,015 in fiscal year 2005 to 168,299 in fiscal year 2008.
- *Change in the component that issued the largest number of NTAs in a fiscal year.* In fiscal year 2006, CBP issued approximately 54.5% of the NTAs issued by DHS, and ICE issued approximately 30.6% of the NTAs issued by DHS. In fiscal year 2008, however, ICE issued approximately 61.7% of the NTAs issued by DHS, and CBP issued approximately 20.1% of the NTAs issued by DHS.

1. Removal Proceedings Initiated by USCIS Officers

a. Credible Fear Determinations by USCIS Asylum Officers

If, during the course of an expedited removal inspection,[70] an arriving noncitizen expresses an intent to apply for asylum or has a fear of persecution or torture if he or she is returned to his or her country of origin, DHS must refer the person to an asylum officer for a "credible fear" interview,[71] which is intended to establish whether the person has a credible fear of persecution if removed to that country. Detention of the applicant by ICE is required pending the credible fear interview. USCIS requires a wait of at least 48 hours after the applicant arrives at the detention center before conducting a credible fear interview, so that the applicant may recover from travel and contact an attorney or other advisor.[72] The 48-hour period may be waived by the applicant.[73] Although an applicant does not have a right to legal representation during a credible fear interview, he or she is allowed to have an

67 The numbers of NTAs, and the percentages related to such data, set forth in the following bullet points and later in this Section of the Report are derived from the OIS Data and the ICE Data summarized in the table above. Consequently, such numbers and percentages are subject to the exclusions, limitations, and qualifications described in the notes to the table above.

68 *See infra* Section II.C.1.c.

69 Although the number of NTAs issued by CBP's Border Patrol declined, the number of criminal prosecutions for immigration matters more than doubled over the same period from 37,884 in fiscal year 2004 to 79,431 in fiscal year 2008, and the growth in immigration prosecutions was largely driven by apprehensions by CBP along the border. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, SYRACUSE UNIVERSITY, IMMIGRATION PROSECUTIONS AT RECORD LEVELS IN FY 2009 (2009), *available at* http://trac.syr.edu/immigration/reports/218/. Furthermore, immigration prosecutions increased 15.7% from 79,431 in fiscal year 2008 to 91,899 in fiscal year 2009. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, SYRACUSE UNIVERSITY, FY 2009 FEDERAL PROSECUTIONS SHARPLY HIGHER: SURGE DRIVEN BY STEEP JUMP IN IMMIGRATION FILINGS (2009), *available at* http://trac.syr.edu/tracreports/crim/223/. This surge in criminal prosecution for immigration matters also coincided with the launch in December 2005, and subsequent expansion, of Operation Streamline, which targets illegal noncitizens apprehended by CBP's Border Patrol in enforcement zones at the Mexican border for immediate criminal prosecution, incarceration, and removal. *See* U.S. CUSTOMS & BORDER PROT., PERFORMANCE AND ACCOUNTABILITY REPORT: FISCAL YEAR 2008 11 (2008), *available at* http://cbp.dhs.gov/linkhandler/cgov/newsroom/publications/admin/par_fy08_pub.ctt/par_fy08.pdf (describing Operation Streamline).

70 *See* discussion of expedited removal in *infra* Section III.E.

71 INA § 235(b)(1)(A)(ii), (B); 8 U.S.C. § 1225(b)(1)(A)(ii), (B). See U.S. Citizenship & Immigration Servs., Q: When Do Credible Fear Interviews Take Place?, http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=ef1b0f953ff9c110VgnVCM1000004718190aRCRD&vgnextchannel=3a82ef4c766fd010VgnVCM1000000ecd190aRCRD (last modified Sept. 26, 2008).

72 *See id*.

73 *Id*.

attorney or other person of his or her choice present.[74]

An asylum officer's credible fear determination involves both an assessment of whether the applicant's story, if true, would render the person eligible for asylum, and a judgment of whether the applicant is credible.[75] During the interview, the noncitizen must establish that there is a significant possibility that he or she could establish in a full hearing before an immigration judge that he or she has been persecuted or has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion if returned to his or her country.[76] The standard of proof is *lower* than the "well-founded" fear of persecution standard required ultimately to obtain asylum.[77] Given the lower screening standard, asylum officers are supposed to draw "all reasonable inferences in favor" of, and afford the "benefit of the doubt" to, the noncitizen.[78]

If an asylum officer finds that an applicant has a credible fear of persecution, then an NTA will be issued placing the person in removal proceedings before an immigration judge, which puts the asylum seeker on a "defensive path" through the asylum application process. If the asylum officer does not find a credible fear of persecution or torture, the noncitizen may request review of the conclusion by an immigration judge.[79] If no review is requested or the immigration judge concurs with the asylum officer's assessment, the noncitizen will be removed by an expedited removal order. If the immigration judge determines that there is a credible fear of persecution, the judge will vacate the removal order and place the noncitizen in removal proceedings under section 240.

The number of credible fear determinations reviewed by immigration judges increased significantly from 42 in fiscal year 2003 to 824 in fiscal year 2007,[80] but then decreased by 14.8% from fiscal year 2007 to fiscal year 2008.[81]

b. Affirmative Asylum Determinations by USCIS Asylum Officers

A noncitizen may seek asylum in the United States not only defensively, in response to the government's attempt to remove the person from the country,[82] but also affirmatively, by filing an application for asylum to USCIS outside the context of a removal proceeding.

Any noncitizen may apply for asylum affirmatively, as long as he or she has not been apprehended by DHS and put into removal proceedings. Accordingly, an affirmative asylum applicant may include, for example, "an individual who maintains a valid non-immigrant visa (e.g., a tourist or student visa) or a person who either overstayed a visa or entered the United States without being formally processed by an immigration official."[83]

If a noncitizen applies for asylum affirmatively, a USCIS asylum officer will schedule and conduct an interview to elicit information necessary to determine the applicant's eligibility for asylum status. The applicant may be represented by an attorney, a BIA-accredited representative, a law student or non-admitted law school graduate, or a reputable

---

74 8 C.F.R. § 208.30(d)(4). Estimates for the number of noncitizens who have representation at the credible fear stage ranges from less than 5% to 50%. The degree to which the attorneys are allowed to participate in the proceeding also varies. Kate Jastram & Tala Hartsough, *A-File and Record of Proceeding Analysis of Expedited Removal* 92, *in* U.S. Comm'n on Int'l Religious Freedom, Report on Asylum Seekers in Expedited Removal, Volume II: Expert Reports (2005). The credible fear interview is nonadversarial, and the asylum officer conducting a credible fear interview has the discretion to permit a representative to make a statement at the end of the interview. 8 C.F.R. § 208.30(d).

75 Jaya Ramji-Nogales, Andrew I. Schoenholtz, & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295, 306 (2007). For an expanded version of *Refugee Roulette*, with commentary by scholars from Canada and the United Kingdom as well as from the United States, please see Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform (NYU Press 2009).

76 INA § 235(b)(1)(B)(v), 8 U.S.C. § 1225(b)(1)(B)(v).

77 Ruth Ellen Wasem, Congressional Research Service, Report RL32621, U.S. Immigration Policy on Asylum Seekers CRS-7 (2005) (citing INA § 235(b)(1)(B)(v)) [hereinafter U.S. Immigration Policy on Asylum Seekers].

78 Immigration Officer Acad., Asylum Officer Basic Training Course: Credible Fear: Lesson Plan Overview 11 (2001).

79 U.S. Immigration Policy on Asylum Seekers, *supra* note 77, at CRS-5. The review must be concluded "as expeditiously as possible, to the maximum extent practicable within 24 hours, but in no case later than 7 days" after the asylum officer's finding of no credible fear. INA § 235(b)(1)(B)(iii)(III), 8 U.S.C. § 1225(b)(1)(B)(iii)(III).

80 Executive Office for Immigration Review, Dep't of Justice, FY 2007 Statistical Year Book C3 (2008), *available at* http://www.justice.gov/eoir/statspub/fy07syb.pdf; EOIR FY2008 Statistical Year Book, *supra* note 29, at C3.

81 EOIR FY2008 Statistical Year Book, *supra* note 29, at C3.

82 *See supra* Section II.A.

83 Ramji-Nogales et al., *supra* note 75, at 305.

layperson who meets certain criteria.[84] No affirmative asylum applicant has a right to be represented by an attorney or other representative at the government's expense.[85] A representative may assist in the preparation of the asylum application and may also be present during the interview with the asylum officer.[86] There is no separate representative for the government. Notwithstanding the presence of a representative for the asylum applicant, the interview with the asylum officer is non-adversarial.[87] Affirmative asylum applicants are rarely detained while their applications are being adjudicated.[88]

Asylum officers make well-founded fear determinations based upon the application form, any accompanying affidavit, the information received during the interview, the credibility of the claim, and other potential information related to the specific case (e.g., information about country conditions).[89] If the asylum officer approves the application and the noncitizen passes the identification and background checks, asylum is granted.[90] If the asylum officer does not grant the asylum claim of a person who is appears to be removable at the time the decision is issued, the asylum officer must issue an NTA and refer the applicant to an immigration judge in EOIR, who will consider the application de novo in an adversarial, formal removal proceeding.[91]

The number of affirmative asylum cases referred to immigration courts from 2004 to 2008 ranged from a high of 40,126 in fiscal year 2007 to a low of 33,392 in fiscal year 2008.[92] USCIS's Asylum Division issued 39,364 NTAs in fiscal year 2007 but only 23,696 in the period from October 1, 2008 to August 31, 2009.[93]

c. Other USCIS Determinations

Officers in USCIS's Domestic Operations Directorate ("DOD") handle applications for immigration benefits submitted by noncitizens, including applications for employment authorization, travel documents, lawful permanent residency, and citizenship.[94] For these purposes, USCIS officers often are required to conduct background checks, including fingerprint and name checks of law enforcement databases,[95] which may reveal grounds for removal. When this happens, a USCIS officer will refer the case to ICE to initiate removal proceedings or issue an NTA.[96]

Prior to 2006, DOD officers did not often issue, serve, and file NTAs in connection with their review of

84 8 C.F.R. § 292.1.

85 INA § 292, 8 U.S.C. § 1362.

86 8 C.F.R. § 240.67(b)(2).

87 *Id.* § 240.67(b)(1).

88 *See* U.S. Citizenship & Immigration Servs., Obtaining Asylum in the United States, http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=dab9f067e3183210VgnVCM100000082ca60aRCRD&vgnextchannel=f39d3e4d77d73210VgnVCM100000082ca60aRCRD (last updated Nov. 23, 2009).

89 U.S. Immigration Policy on Asylum Seekers, *supra* note 77, at CRS-7. As with determinations made by asylum officers in the credible fear interviews (*see supra* Section II.C.1.a), the asylum officer's determination involves both an objective assessment as to whether the applicant qualifies for asylum protection under U.S. law and a subjective assessment of the applicant's credibility.

90 *Id*. at CRS-9.

91 *Id.*

92 EOIR FY2008 Statistical Year Book, *supra* note 29, at I1.

93 Data provided by the Office of Immigration Statistics, U.S. Department of Homeland Security, in November 2009 (on file with the American Bar Association Commission on Immigration). In addition to issuing NTAs when referring affirmative asylum claims to the immigration courts, asylum officers have prosecutorial discretion to issue NTAs under other circumstances, including issuing NTAs against an affirmative asylum applicant's dependent who is believed to be removable. *See generally* Asylum Division, Refugee, Asylum, & Int'l Operations Directorate, U.S. Citizenship & Immigration Servs., Affirmative Asylum Procedures Manual (2007), *available at* http://www.uscis.gov/files/nativedocuments/AffrmAsyManFNL.pdf.

94 *See* U.S. Citizenship & Immigration Servs., Annual Report for Fiscal Year 2008, at 56 (2009).

95 *See* Bryan Lonegan & the Immigration Law Unit of the Legal Aid Soc'y, Immigration Detention and Removal: A Guide for Detainees and Their Families 2 (2004).

96 *See* Michael L. Aytes, Assoc. Dir. for Domestic Operations, U.S. Citizenship & Immigration Servs., Policy Memorandum No. 110: Disposition of Cases involving Removable Noncitizens (July 11, 2006) [hereinafter USCIS Policy Memorandum No. 110].

benefit applications.[97] Following the issuance of a number of memoranda and guidelines,[98] the number of NTAs issued by DOD officers nearly doubled in two years, from 6,969 for the 12-month period ended March 2005 to 13,350 for the 12 months ending March 2007.[99] From October 1, 2008 to August 31, 2009, USCIS DOD officers issued 29,489 NTAs,[100] which represented 55.4% of the NTAs issued by USCIS in that period.[101] Prior to that, the majority of NTAs issued by USCIS were issued by the Asylum Division.

Decisions regarding the issuance of NTAs are made by USCIS personnel (other than asylum officers) on the basis of policies and procedures that became effective on October 1, 2006.[102] Under these policies, USCIS officers must refer certain types of cases to ICE, which will decide whether to issue an NTA. These cases are divided into three categories: (1) national security cases; (2) egregious public safety cases (e.g., where an applicant has been arrested for murdering a minor); and (3) other criminal cases.[103]

In some cases, issuance of an NTA is prescribed by regulation.[104] Where USCIS suspects that an application is fraudulent, the applicant's case is referred to ICE.[105] If ICE declines the case, USCIS will investigate and, if it finds fraud, will issue an NTA.[106] In all other cases, USCIS managers have discretion in deciding whether to issue an NTA.[107] Standard procedures provide that "if an applicant is removable and there are no means of relief available (e.g., voluntary departure, reinstatement, or eligibility for another status), then an NTA should normally be prepared."[108] Legal counsel is available to review all NTAs, but such review is not required.[109] Deviations from these procedures must be approved by the Director of Service Center Operations or by the Director of Field Operations.[110]

2. Removal Proceedings Initiated by CBP Officers

CBP officers are authorized to issue NTAs and are responsible for the apprehension of individuals at ports of entry and the U.S. border. At ports of entry, CBP officers inspect individuals seeking admission to the United States. During such inspection, certain noncitizens are subject to expedited removal (see Section III.E below). If an examining CBP officer determines that "grounds of inadmissibility" other than fraud, willful misrepresentation, or lack of proper documents are applicable and wishes to remove the noncitizen on that basis, then the person shall be detained and an NTA shall be issued.[111] For fiscal years 2004 through 2008, the number of NTAs issued by CBP

97 *See* Prakash Khatri, Ombudsman, U.S. Citizenship & Immigration Servs., Memorandum to Dr. Emilio T. Gonzalez, Dir., U.S. Citizenship & Immigration Servs., at 1 (Mar. 20, 2006), *available at* http://www.dhs.gov/xlibrary/assets/CISOmbudsman_RR_22-Notice_to Appear_03-20-06.pdf (recommending to USCIS that its policy on issuing NTAs be standardized to provide that NTAs be issued and filed with the immigration court in all cases where, as a result of adjustment of status denial, the applicant is out of status). The Ombudsman observed that it was generally accepted that USCIS did not have the resources available to issue NTAs in every case where an adjustment of status application was denied and that the immigration court could not process the volume of removal cases that such a policy would cause.

98 *See* Memorandum from William R. Yates, Assoc. Dir. for Domestic Operations, U.S. Citizenship & Immigration Servs., to Regional Dirs. & Serv. Center Dirs., Service Center Issuance of Notice to Appear (Form I-862) 1 (Sept. 12, 2003); *see also* USCIS Policy Memorandum No. 110, *supra* note 96.

99 U.S. Citizenship & Immigration Servs. Ombudsman, 2007 Annual Report to Congress 96 (June 11, 2007), *available at* http://www.dhs.gov/xlibrary/assets/CISOMB_Annual_Report_2007.pdf.

100 Data provided by the Office of Immigration Statistics, U.S. Department of Homeland Security, *supra* note 93.

101 *See id.*

102 *See* USCIS Policy Memorandum No. 110, *supra* note 96, which outlines protocols to be followed pursuant to a Memorandum of Understanding between USCIS and ICE.

103 *Id.* at 2-6.

104 *Id.* at 6; 8 C.F.R. § 216.3(a) (petitions to remove conditions on residence); 8 C.F.R. § 216.6(a)(5) (petitions by entrepreneurs to remove conditions); 8 C.F.R. § 207.9 (applications for family unity benefits); 8 C.F.R. § 207.9 (termination of refugee status).

105 USCIS Policy Memorandum No. 110, *supra* note 96, at 6.

106 *Id.*

107 For more discussion of DHS's policies and procedures affirming the exercise of prosecutorial discretion, see *infra* Section III.A.2.

108 USCIS Policy Memorandum No. 110, *supra* note 96, at 7.

109 *Id*.

110 *Id.*

111 INA § 235(b)(2), 8 U.S.C. § 1225(b)(2); 8 C.F.R. § 235.3(b)(3).

officers at ports of entry ranged from a high of 24,864 in fiscal year 2007 to a low of 20,267 in fiscal year 2004.[112]

If a CBP officer at a port of entry is unable to make an immediate decision about admissibility and has reason to believe the person may be able to overcome a finding of inadmissibility by presenting additional evidence or upon further review of the case, the CBP officer may parole the person and refer inspection to a CBP deferred inspection office.[113] If the paroled noncitizen fails to appear for his or her deferred inspection interview, then the CBP officer will issue an NTA.[114]

An NTA also is issued if, during a deferred inspection interview, the CBP officer determines that the paroled noncitizen is inadmissible. If the individual requests, and if a supervising officer deems it appropriate, he or she may be allowed to have a lawyer present at the deferred inspection interview, but the role of the lawyer is limited to that of an observer and consultant.

For enforcement *at the border*, the federal government has funded nearly 11,000 new CBP Border Patrol agents and constructed close to 100 miles of new border fencing since 2001.[115] Agents who intercept undocumented noncitizens at or near border crossings had frequently released them with NTAs for further proceedings — the so-called "catch and release" approach.[116] However, in 2005, Congress funded the Strategic Border Initiative ("SBI"), a key element of which is the elimination of catch and release, with the goal of removing "every single illegal entrant amenable to removal — no exceptions."[117] Subsequently, the number of NTAs issued by CBP's Border Patrol decreased significantly from 166,969 in fiscal year 2005 to 36,184 in fiscal year 2008.[118] But, the number of criminal prosecutions of immigration matters more than doubled over the same period from 37,884 in fiscal year 2004 to 79,431 in fiscal year 2008.[119]

3. Removal Proceedings Initiated by ICE Officers

In addition to cases referred to them by USCIS, ICE officers typically encounter two types of individuals who may be subject to removal. The first category is noncitizens who are the target of an investigation, e.g., the subject of a fugitive operation designed to locate and remove noncitizens who have ignored prior removal orders. When ICE officers encounter noncitizens believed to be fugitives, criminals, or other investigation targets, their discretion is limited by policies and procedures governing the handling of targeted noncitizens.[120]

The second category is noncitizens who are not the target of an investigation but who are encountered by officers through the course of an operation or other activities.[121] In these cases, ICE officers have discretion to apprehend a noncitizen and transport the person to an ICE facility to initiate the removal process, to schedule an appointment for the noncitizen to report at an ICE facility at a later date, or to issue an NTA by mail.[122]

---

112 *See* data provided by the Office of Immigration Statistics, U.S. Department of Homeland Security, in November 2009 (on file with the American Bar Association Commission on Immigration).

113 8 C.F.R. § 235.2(b). To defer inspection, a CBP officer must obtain the approval of the District Director, Deputy District Director, Assistant District Director of Inspections, or Assistant District Director of Examinations. Johnny N. Williams, Executive Assoc. Comm'r, Office of Field Operations, Immigration & Naturalization Serv., Memorandum, Deferred Inspection Policy 2 (May 18, 2002).

114 Memorandum from Johnny N. Williams, *supra* note 113, at 2.

115 Office of Mgmt. & Budget, Budget of the United States Government for Fiscal Year 2009, at 72 (2008).

116 Pursuant to the "catch and release" approach, in fiscal year 2005, CBP apprehended about 160,000 non-Mexican noncitizens along the southwest border, with approximately 120,000 of them released from custody, issued NTAs and instructed to appear at immigration court at a later date. Michael Chertoff, Sec'y, U.S. Dep't of Homeland Sec., Remarks at the Houston Forum (Nov. 2, 2005), *available at* http://www.dhs.gov/xnews/speeches/speech_0261.shtm.

117 Press Release, U.S. Dep't of Homeland Sec., DHS Announces Long-Term Border and Immigration Strategy (Nov. 2, 2005), *available at* http://www.dhs.gov/xnews/releases/press_release_0795.shtm.

118 *See* data provided by the Office of Immigration Statistics, U.S. Department of Homeland Security, in November 2009 (on file with the American Bar Association Commission on Immigration).

119 *See supra* note 69.

120 U.S. Gov't Accountability Office, Immigration Enforcement: ICE Could Improve Controls to Help Guide Noncitizen Removal Decision Making 2 (2007) [hereinafter GAO Immigration Enforcement Report], *available at* http://www.gao.gov/new.items/d0867.pdf.

121 *Id.* at 6.

122 *Id.*; *see also* 8 C.F.R. § 239.1.

The primary goal of many ICE officers is to initiate removal proceedings for any noncitizen encountered who may be subject to removal.[123] However, universal enforcement is neither feasible nor desirable.[124] Accordingly, ICE officers exercise discretion in the performance of their duties, particularly at the early stages of the enforcement process (e.g., the investigative, initial encounter, and apprehension stages).[125] ICE guidance instructs officers to consider a number of factors, such as humanitarian issues, flight risk, availability of detention space, and whether the noncitizen is a threat to the community.[126]

At the charging phase, ICE officers have discretion to pursue formal removal proceedings before an immigration judge or permit the noncitizen to depart the country voluntarily. The extent to which discretion is exercised in favor of voluntary departure or the issuance of an NTA varies widely across field offices.[127] A noncitizen who accepts the option to depart voluntarily must admit his or her entry was illegal and waive the right to an immigration hearing.[128] This option is only available to noncitizens from contiguous countries (i.e., Canada and Mexico), and those accepting it are escorted to the point of departure.[129]

a. Worksite Enforcement

The number of individuals arrested through worksite enforcement efforts, which had been increasing gradually between fiscal year 2002 and fiscal year 2005, skyrocketed during the next three fiscal years. In fiscal year 2002, there were 25 criminal arrests and 485 administrative arrests resulting from worksite enforcement efforts.[130] Those numbers climbed to 176 criminal arrests and 1,116 administrative arrests in fiscal year 2005 and 1,103 criminal arrests and 5,184 administrative arrests in fiscal year 2008.[131] According to ICE, it had developed a "comprehensive worksite enforcement strategy that promotes national security, protects critical infrastructure and ensures fair labor standards."[132] However, worksite enforcement decisions remained primarily directed at immigration violations rather than terrorist or national security concerns.[133]

In April 2009, DHS Secretary Napolitano issued new guidelines for ICE's worksite enforcement activities, reflecting a shift in focus from the arrest of noncitizen employees believed to be removable to the criminal prosecution of employers who knowingly hire noncitizens not permitted to work in the United States.[134] These guidelines acknowledge the necessity of effectively allocating DHS's extensive but finite enforcement resources and assert that worksite enforcement efforts focused on employers will target more effectively a root cause of illegal immigration — the prospect for employment in the United States.[135] The guidelines provide that absent exigent circumstances, ICE officers should obtain indictments,

123 GAO Immigration Enforcement Report, *supra* note 120, at 12.

124 *See generally* Memorandum from Doris Meissner, Comm'r, Immigration & Naturalization Servs., to Regional Dirs., District Dirs., Chief Patrol Agents, & Regional & Dist. Counsel, Exercising Prosecutorial Discretion (Nov. 17, 2000).

125 GAO Immigration Enforcement Report, *supra* note 120, at 2-3.

126 *Id.* at 15.

127 *Id.* at 14-15.

128 CRS Immigration Enforcement, *supra* note 33, at CRS-12 n.55.

129 *Id.* at CRS-12.

130 Fact Sheet, U.S. Immigration & Customs Enforcement, Worksite Enforcement Overview (Apr. 30, 2009), *available at* http://www.ice.gov/pi/news/factsheets/worksite.htm (last modified Apr. 30, 2009).

131 *Id.* Of the 1,103 criminal arrests, 135 were owners, managers, supervisors, or human resources employees facing charges including harboring or knowingly hiring illegal noncitizens. The remaining individuals faced charges including aggravated identity theft and Social Security fraud. The 5,184 administrative arrests were for immigration violations.

132 U.S. Immigration & Customs Enforcement, Office of Investigations – Worksite Enforcement, http://www.ice.gov/pi/worksite/index.htm (last modified Mar. 25, 2009).

133 From 2004 through 2006, a claim of terrorism was made against only 12 (0.0015%) out of 814,073 individuals against whom DHS filed charges, and charges relating to national security were made against only 114 (0.014%). Transactional Records Access Clearinghouse, Syracuse University, Immigration Enforcement: The Rhetoric, The Reality (2007), *available at* http://trac.syr.edu/immigration/reports/178/.

134 Fact Sheet, U.S. Immigration & Customs Enforcement, *supra* note 130.

135 Memorandum from Marcy M. Forman, Dir., Office of Investigations, U.S. Immigration & Customs Enforcement, to the Ass't Dir., the Deputy Ass't Dirs., & the Special Agents in Charge, Worksite Enforcement Strategy 1 (Apr. 30, 2009), *available at* http://www.ice.gov/doclib/foia/dro_policy_memos/worksite_enforcement_strategy4_30_2009.pdf.

criminal arrest or search warrants, or a commitment from a U.S. Attorney's Office to prosecute the targeted employer, before arresting employees for civil immigration violations at a worksite.[136] Nonetheless, the guidelines provide that ICE will continue to arrest and process for removal any noncitizen believed to be removable who is encountered in the course of a worksite enforcement action because "the administrative arrest of the illegal workforce under ICE's existing immigration authorities continues to be an integral aspect of the overall ICE worksite enforcement strategy."[137]

Notwithstanding the effect, if any, these new guidelines will have on ICE's worksite enforcement activities, ICE officers will continue to be pressed to choose how to apply enforcement resources in worksite raids. Although there are agency priorities guiding enforcement decisions (e.g., criminal violators and employers at critical infrastructure and national security worksites), ICE officers have some discretion to select enforcement targets and to issue NTAs to initiate removal proceedings against noncitizens encountered in the course of worksite raids.

b. National Fugitive Operations Program

The National Fugitive Operations Program ("NFOP") was initiated by ICE in 2003 for the purpose of locating, arresting, and removing "ICE fugitives" from the United States. An "ICE fugitive" is a noncitizen who has failed to leave the country pursuant to a final order of removal, deportation, or exclusion, or who has failed to report to a Detention and Removal Officer after receiving notice to do so.[138] There were only eight Fugitive Operations Teams ("FOTs") in fiscal year 2003 but 104 by August 2009.[139]

Limited resources require NFOP to prioritize the fugitives on which to focus its resources. According to ICE, its Fugitive Operations Teams prioritize removing fugitive noncitizens deemed to pose a threat to national security or community safety, such as members of transnational street gangs, child sex offenders, and noncitizens with prior convictions for violent crimes.[140] Apprehensions by ICE's Fugitive Operations Teams, however, have not been consistent with these priorities:

- 73% of the individuals apprehended by FOTs from 2003 through February 2008 had no criminal conviction;
- fugitive noncitizens with criminal convictions represented a declining percentage of total apprehensions by FOTs: 32% in fiscal year 2003, 17% in fiscal year 2006, and 9% in fiscal year 2007; and
- "collateral arrests," or arrests of non-fugitive, undocumented noncitizens, increased over the years and represented 40% of total apprehensions by FOTs in fiscal year 2007.[141]

---

136 *Id*. at 2, 4.

137 *Id*. at 1, 4.

138 U.S. Immigration & Customs Enforcement, Programs – National Fugitive Operations Program, http://www.ice.gov/pi/dro/nfop.htm (last modified Nov. 10, 2008).

13 Fact Sheet, U.S. Immigration & Customs Enforcement, Detention and Removal – ICE Fugitive Operations Program (Aug. 19, 2009), *available at* http://www.ice.gov/pi/news/factsheets/NFOP_FS.htm (last modified Nov. 2, 2009).

140 *Id*.

141 Margot Mendelson, Shayna Strom & Michael Wishnie, Migration Policy Inst., Collateral Damage: An Examination of ICE's Fugitive Operations Program 1-2 (2009).

In addition to the growth in arrests by ICE's Fugitive Operations Teams, the number of NTAs issued by Fugitive Operations Teams grew from 1,779 in fiscal year 2005 to 5,971 in fiscal year 2009,[142] peaking at 8,885 in fiscal year 2007, as shown in the table below:[143]

FISCAL YEAR	FUGITIVE OPERATIONS ARRESTS	FUGITIVE OPERATIONS NTAS	FUGITIVE OPERATIONS NTAS, AS PERCENTAGE OF ARRESTS
2005	7,959	1,779	22.4%
2006	15,462	4,145	26.8%
2007	30,407	8,885	29.2%
2008	34,155	5,971	17.5%
2009	Not available	5,903	Not available

c. Apprehension by Local Agencies under 287(g) Program

Section 287(g) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") authorizes the Secretary of DHS to enter into agreements with state and local law enforcement agencies to enforce U.S. immigration laws. ICE created the 287(g) program as a component of the program entitled Agreements of Cooperation in Communities to Enhance Safety and Security ("ACCESS"), which began in August 2007 and was created for the purpose of ensuring constant, coordinated, effective, and efficient communication and teamwork between federal and local law enforcement.[144]

ICE's Office of State and Local Coordination is responsible for the 287(g) program, which acts as a "force multiplier" by authorizing local law enforcement officers, who have received appropriate training, to participate in immigration enforcement efforts under the supervision of ICE officers. As of December 10, 2009, 66 state or local law enforcement agencies are participants in the 287(g) program pursuant to Memoranda of Agreement signed with ICE, and one state agency is party to a Memorandum of Agreement in principle, pending receipt of local approval.[145]

There have been significant criticisms of the 287(g) program, including by the U.S. Government Accountability Office ("GAO").[146] Some organizations have urged the termination of the 287(g) program.[147] Notwithstanding ICE's articulated immigration enforcement priorities with respect to criminal noncitizens, some local law enforcement participants in the 287(g) program have used their 287(g) authority to process for removal noncitizens for

142 Data provided by the Office of Policy, Immigration and Customs Enforcement, in November 2009 (on file with the American Bar Association Commission on Immigration).

143 *See generally* ICE Fiscal Year 2008 Annual Report, *supra* note 37, at 3; data provided by the Office of Policy, Immigration and Customs Enforcement, *supra* note 142.

144 *See* U.S. Gov't Accountability Office, Immigration Enforcement: Better Controls Needed over Program Authorizing State and Local Enforcement of Federal Immigration Laws 8 (2009) [hereinafter GAO 287(g) Program], *available at* http://www.gao.gov/new.items/d09109.pdf.

145 Fact Sheet, U.S. Immigration & Customs Enforcement, Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act – The ICE 287(g) Program: A Law Enforcement Partnership (Nov. 13, 2009), *available at* http://www.ice.gov/pi/news/factsheets/section287_g.htm (last modified Dec. 10, 2009).

146 *See* GAO 287(g) Program, *supra* note 144, at 4-6 (reporting that ICE did not have sufficient controls to ensure that 287(g) program participants were implementing the 287(g) program objectives of addressing serious criminal activity committed by removable noncitizens).

147 For example, on August 25, 2009, 521 local and national organizations, including the American Civil Liberties Union, the American Immigration Lawyers Association, and the National Immigration Law Center, sent a letter to President Obama urging the termination of the 287(g) program. Letter from Marielena Hincapié, Executive Dir., Nat'l Immigration Law Ctr., to Barack Obama, President of the United States (Aug. 25, 2009).

minor offenses,[148] and certain local law enforcement participants have been accused of using racial profiling in their immigration enforcement activities.[149] In addition, some organizations, including the Police Foundation, the International Association of Chiefs of Police, and the Major Cities Chiefs Association, believe that deputizing local law enforcement officers to enforce federal immigration law undermines public safety, diverts scarce resources, and increases fear in communities.[150]

In light of the findings and recommendations in the GAO's January 2009 report, ICE has taken steps to communicate to 287(g) program participants the objectives of the 287(g) program and otherwise strengthen ICE's oversight over the 287(g) program.[151] At the same time, DHS and ICE affirmed that ICE's enforcement priorities were the identification and removal of criminal noncitizens and that the 287(g) program "is an essential component of DHS' [sic] comprehensive immigration enforcement strategy."[152]

Since fiscal year 2006, the number of NTAs issued under the 287(g) program increased from 5,799 in fiscal year 2006 to 32,254 in fiscal year 2009.[153] Prior to fiscal year 2009, the number of NTAs issued under the 287(g) program in a fiscal year was less than the number of NTAs issued by ICE's Office of Investigations (which is responsible for worksite enforcement actions); in fiscal year 2009, the number of NTAs issued under the 287(g) program (i.e., 32,254) was almost twice the number of NTAs issued by ICE's Office of Investigations (i.e., 16,775). Combined with the reforms and expansion of the 287(g) program implemented in 2009,[154] this suggests that notwithstanding criticisms of the 287(g) program, it will play a larger role in DHS's immigration enforcement strategy.

d. Criminal Alien Program and Secure Communities

Two other components of ACCESS focus on identifying, processing, and removing criminal noncitizens in federal, state, and local prisons and jails: (1) the Criminal Alien Program ("CAP"); and (2) Secure Communities: A Comprehensive Plan to Identify and Remove Criminal Aliens ("Secure Communities").

CAP began in June 2007 when ICE's Office of Detention and Removal ("DRO") assumed complete responsibility and oversight for two predecessor programs known as the Institutional Removal Program and the Alien Criminal Apprehension Program.[155] CAP seeks to prevent noncitizens incarcerated in federal, state, and local prisons and jails from being released into the general public by identifying them and securing a final order of removal, when possible, before their sentences are completed.[156] Generally, local law

148 GAO 287(G) PROGRAM, *supra* note 144, at 11 (reporting that four of the 29 participating agencies told the GAO that they used their 287(g) authority to process for removal noncitizens stopped by officers for minor violations, such as speeding, carrying an open container, or urinating in public).

149 The American Civil Liberties Union argues that an examination of data collected in states in which the collection of racial profiling data is required suggests that a significant percentage of individuals stopped by 287(g)-deputized officers are Latino and stopped and arrested for traffic or other minor offenses. In particular, the American Civil Liberties Union cited a study of arrest data in Tennessee that found the arrest rates in Davidson County for Latino defendants driving without a license more than doubled after the 287(g) program was implemented in that county. *Examining 287(g): The Role of State and Local Law Enforcement in Immigration Law: Hearing Before the H. Comm. on Homeland Security* 111th Cong. 5 (2009) (written statement of the Am. Civil Liberties Union), *available at* http://www.aclu.org/files/images/asset_upload_file717_39062.pdf.

150 Letter from Marielena Hincapié, *supra* note 147, at 1.

151 Press Release, U.S. Dep't of Homeland Sec., Secretary Napolitano Announces New Agreement for State and Local Immigration Enforcement Partnerships & Adds 11 New Agreements (July 10, 2009), *available at* http://www.dhs.gov/ynews/releases/pr_1247246453625.shtm.

152 *Id.*

153 Data provided by the Office of Policy, Immigration and Customs Enforcement, *supra* note 142.

154 *See* Press Release, U.S. Dep't of Homeland Sec., *supra* note 151.

155 *See* MELISSA KEANEY & JOAN FRIEDLAND, NAT'L IMMIGRATION LAW CTR., OVERVIEW OF THE KEY ICE ACCESS PROGRAMS: 287(G), THE CRIMINAL ALIEN PROGRAM, AND SECURE COMMUNITIES 4 (2009), *available at* http://www.nilc.org/immlawpolicy/LocalLaw/ice-access-2009-11-05.pdf.

156 Fact Sheet, U.S. Immigration & Customs Enforcement, Criminal Alien Program (Nov. 19, 2008), *available at* http://www.ice.gov/pi/news/factsheets/criminal_alien_program.htm (last modified Nov. 25, 2008).

enforcement agencies notify ICE of foreign-born[157] detainees in their custody based on information obtained from the booking process, and DRO officers assigned under CAP to the applicable facilities interview selected inmates, place detainers[158] on those inmates believed to be removable, and issue NTAs to those inmates.[159]

In March 2008, ICE reported that pursuant to CAP, it screened 100% of Tier 1 and Tier 2 facilities,[160] 100% of all federal and state facilities, but only ten percent of the local jails throughout the United States, which make up the vast majority of the Tier 3 and Tier 4 facilities.[161] Although CAP does not cover all federal, state, and local facilities, the number of NTAs issued by ICE officers under CAP is significant. The number of NTAs issued under CAP in each of fiscal years 2007, 2008, and 2009 was 74,008, 123,670, and 113,367, respectively, and represented 54.2%, 68.9%, and 67.4%, respectively, of the aggregate number of NTAs issued by ICE in the applicable fiscal year.[162]

ICE announced in March 2008 that it expected to expand its coverage of local facilities nationwide in a cost-effective manner by "[l]everaging integration technology that shares law enforcement data between federal, state, and local law enforcement agencies" through Secure Communities.[163] Like CAP, Secure Communities aims to identify criminal noncitizens and prioritize their removal based on the threat posed to the community.[164] Rather than relying on local law enforcement agencies and DRO officers to identify foreign-born individuals incarcerated in federal, state, and local prisons and jails, however, Secure Communities relies on law enforcement agencies' typical booking processes (i.e., submission of an arrestee's fingerprints through Federal Bureau of Investigation's databases) and uses biometric identification technologies to identify incarcerated foreign-born individuals and to automatically notify ICE of matches found.[165]

ICE reported that biometric identification under Secure Communities is available in 81 jurisdictions in nine states[166] as of August 31, 2009 and that it expects to achieve nationwide coverage by 2013.[167] Deploying biometric identification technologies to local jails and booking locations nationwide is expected to increase dramatically the number of noncitizens subject to removal proceedings and ICE custody.[168] Currently,

157 Although most foreign-born persons are not U.S. citizens, there are exceptions. For example, a child born outside of the United States may be a derivative U.S. citizen because his or her father or mother is a U.S. citizen. *See* U.S. Citizenship & Immigration Servs., Citizenship Through Parents, http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=32dffe9dd4aa3210VgnVCM100000b92ca60aRCRD&vgnextchannel=32dffe9dd4aa3210VgnVCM100000b92ca60aRCRD (last modified Sept. 4, 2009).

158 ICE detainers are notices to jails or prison that ICE intends to take custody of an incarcerated noncitizen upon release and requests that ICE be notified before such release. *See* KEANEY & FRIEDLAND, *supra* note 155, at 4.

159 *See* Fact Sheet, U.S. Immigration & Customs Enforcement, *supra* note 156; *see also* KEANEY & FRIEDLAND, *supra* note 155, at 4. In addition, DRO officers assigned to ICE's Detention Enforcement and Processing Offenders by Remote Technology center in Chicago also conduct interviews of selected inmates remotely and process inmates believed to be removable through CAP. *See* KEANEY & FRIEDLAND, *supra* note 155, at 4; Fact Sheet, U.S. Immigration & Customs Enforcement, ICE Office of Detention and Removal (Nov. 2, 2006), *available at* http://www.ice.gov/pi/news/factsheets/dro110206.htm (last modified Nov. 12, 2008).

160 CAP assessed risk based on the facilities housing criminals, which facilities have been grouped into four tiers, with Tier 1 housing viewed as those posing the highest risk to national security and public safety. Fact Sheet, U.S. Immigration & Customs Enforcement, Secure Communities 1, 3, 5 (Mar. 28, 2008), *available at* http://www.aila.org/content/default.aspx?docid=25045.

161 *Id*. at 3.

162 Data provided by the Office of Policy, Immigration and Customs Enforcement, *supra* note 142.

163 Fact Sheet, U.S. Immigration & Customs Enforcement, *supra* note 160.

164 *See* Press Release, U.S. Immigration & Customs Enforcement, ICE Unveils Sweeping New Plan to Target Criminal Aliens in Jails Nationwide: Initiative Aims to Identify and Remove Criminal Aliens from All U.S. Jails and Prisons (Mar. 28, 2008), *available at* http://www.ice.gov/pi/news/newsreleases/articles/080328washington.htm; U.S. Immigration & Customs Enforcement, Secure Communities Mission & Background, http://www.ice.gov/secure_communities/mission.htm (last modified May 26, 2009); U.S. Immigration & Customs Enforcement, Secure Communities Fact Sheet (Sept. 1, 2009) [hereinafter Secure Communities Fact Sheet], http://www.ice.gov/doclib/pi/news/factsheets/secure_communities.pdf.

165 *See* Fact Sheet, U.S. Immigration & Customs Enforcement, *supra* note 160, at 5.

166 The states are Arizona, California, Florida, Massachusetts, North Carolina, New Mexico, Pennsylvania, Texas, and Virginia. *See* U.S. Immigration & Customs Enforcement, Secure Communities – Phased Implementation, http://www.ice.gov/secure_communities/deployment/ (last modified Sept. 24, 2009).

167 *See id*.

168 Secure Communities Fact Sheet, *supra* note 164, at 2.

ICE is prioritizing roll-out of the biometric identification technologies under Secure Communities to local law enforcement authorities in jurisdictions where ICE's analysis has determined criminal noncitizens are most likely to reside.[169] In addition, ICE has stated that Secure Communities is focused:

> first and foremost on the most dangerous criminal aliens currently charged with, or previously convicted of, the most serious criminal offenses[,] . . . including, crimes involving national security, homicide, kidnapping, assault, robbery, sex offenses, and narcotics violations carrying sentences of more than one year.[170]

In light of Secure Communities' apparent goal of screening all individuals arrested and booked at all federal, state, and local facilities in the United States, it is unclear, however, what procedures, if any, will be implemented to ensure that Secure Communities' priorities are implemented.

III. Issues Relating to the Department of Homeland Security

A. DHS Policies and Procedures Increase Case Load Burdens in the Removal Adjudication System

An enormous expansion of immigration enforcement activity and resources has not been matched by a commensurate increase in resources for the adjudication of immigration cases. As a result, the adjudication system has been overwhelmed by the increasing caseload. As set forth in detail in Part 2 of this Report, the immigration courts are especially overburdened, leaving immigration judges with little time to spend on individual cases, many of which require complex determinations of fact and law. The burgeoning caseload has also resulted in "burnout" of immigration judges and their staff members. While this imbalance between judges and cases is in part a function of insufficient funding and staffing for the immigration courts, some DHS policies and practices contribute to the burden.

1. Case Load Burdens and Use of Resources

Since IIRIRA became effective, the number of noncitizens removed from the United States has increased from 69,680 in fiscal year 1996[171] to 356,739 in fiscal year 2008 — a more than 400% increase.[172] The number of cases commenced in the immigration courts to expel noncitizens grew more than 20% from 231,502 combined pre-IIRIRA deportation and exclusion proceedings in fiscal year 1996[173] to 285,178 removal proceedings in fiscal year 2008.[174] The number of NTAs issued by DHS grew from 213,887 in fiscal year 2006 to 291,217 in fiscal year 2008.[175]

The Office of the Principal Legal Advisor within ICE ("OPLA") has exclusive authority to prosecute all removal proceedings.[176] In fiscal year 2008, OPLA completed a total of 126,050 matters in the immigration courts, including 94,072 removal proceedings, 10,495 bond proceedings, and 21,483 motions to reopen or reconsider.[177]

ICE trial attorneys face the following challenges in effectively managing the caseload of removal proceedings:[178]

- As of the end of 2005, there were only 600 or so attorneys to handle the enormous and ever-increasing caseload. As a result, in 2005, ICE trial

169 According to ICE, it will specifically "[u]se modeling techniques to prioritize deployment to locations with the greatest amount of violent crimes committed by foreign-born persons." U.S. Immigration & Customs Enforcement, Secure Communities – Strategy to Accelerate and Expand Secure Communities, http://www.ice.gov/secure_communities/deployment/strategy.htm (last modified June 24, 2009).

170 Secure Communities Fact Sheet, *supra* note 164, at 2.

171 Office of Immigration Statistics, U.S. Dep't of Homeland Sec., Immigration Enforcement Actions: 2005, at 5 (2006), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2005/Enforcement_AR_05.pdf.

172 ICE Fiscal Year 2008 Annual Report, *supra* note 37, at 8.

173 Executive Office for Immigration Review, U.S. Dep't of Justice, Statistical Year Book 2000 D1 (2001).

174 EOIR FY2008 Statistical Year Book, *supra* note 29, at C3.

175 *See supra* Section II.C.

176 HSA § 442(c), 116 Stat. at 2194; 6 U.S.C. § 252(c).

177 ICE Fiscal Year 2008 Annual Report, *supra* note 37, at 28.

178 *See* Memorandum from William J. Howard, Principal Legal Advisor, U.S. Dep't of Homeland Sec., to All OPLA Chief Counsel (Oct. 24, 2005), *available at* http://www.refugees.org/uploadedFiles/Participate/National_Center/Resource_Library/Oct24th%202005(1).pdf.

attorneys had approximately 20 minutes on average to prepare a case. Today, ICE has more than 900 attorneys[179] and obtained approval to employ 916 attorneys, including 735 trial attorneys, in fiscal year 2009.[180] This increase in legal staffing, however, does not appear to have eased the caseload burden.

- OPLA cases come from CBP, USCIS, and ICE, because all three components of DHS are authorized to issue NTAs. Therefore, OPLA attorneys cannot easily consult with the immigration agent or border patrol officer prior to exercising prosecutorial discretion, since the officer who issued the NTA might be in a different agency, building, or city.
- OPLA attorneys have been called upon with increasing frequency to help Assistant U.S. Attorneys with cases in the federal appellate courts when DOJ's Office of Immigration Litigation has become overwhelmed by the sudden and dramatic growth in appeals.

An important reason for the increasing caseload for the immigration courts and OPLA attorneys is the increasing focus on apprehending and removing all criminal noncitizens, which has coincided with the increase in the number of NTAs issued by ICE, as described in Section II.C above. In light of the planned expansion of ICE's ability to screen each arrestee's immigration status to all federal, state, and local facilities in the United States by 2013 pursuant to ICE's Secure Communities initiative,[181] and a possible expansion of such screening to other phases of the enforcement process,[182] the caseload burden on the immigration courts (and OPLA attorneys) may very well increase further in the future. In fact, Stewart Baker, former DHS Assistant Secretary for Policy, noted that the surge in removal actions arising from the Secure Communities initiative will require more prosecutors, immigration judges, detention beds, and other resources.[183]

Another reason for the increasing caseload for the immigration courts and OPLA attorneys is the increase in the number of NTAs issued by officers in USCIS's Domestic Operations Directorate.[184]

2. Insufficient Use of Prosecutorial Discretion

DHS officers in ICE, CBP, and USCIS have considerable discretion with respect to removal proceedings against noncitizens in a variety of circumstances. In particular, they have discretion not to initiate proceedings at all; to concede eligibility for relief from removal after receipt of an application; to stop litigating a case after key facts develop to make removal unlikely (such as the serious illness of the respondent or a family member); to offer deferred action or a stay of removal early in the process; and not to file an appeal in certain types of cases (such as CAT relief).

The decision to serve an NTA on a noncitizen thus is an exercise of prosecutorial discretion.[185] DHS policy is that "[a]s a general matter, [officers] may decline to prosecute a legally sufficient immigration case if the Federal immigration enforcement interest that would be served by prosecution is not substantial."[186]

In addition, DHS attorneys are able to exercise great discretion with regard to the issues, and even the cases, that will be litigated. Given limited judicial resources at all levels (immigration judges, BIA, courts

179 U.S. Immigration & Customs Enforcement, Leadership – Principal Legal Advisor, Peter S. Vincent, http://www.ice.gov/about/leadership/pla_bio/peter_vincent.htm (last modified Sept. 14, 2009).

180 *See* Andrew Becker & Hugo Cabrera, *Notice to Appear: Immigration Courts Make Do With Limited Resources Despite Mounting Caseloads*, CENTER FOR INVESTIGATIVE REPORTING, June 30, 2009, http://www.centerforinvestigativereporting.org/node/4123.

181 *See supra* Section II.C.3.d.

182 *See Priorities Enforcing Immigration Law: Hearing Before the Subcomm. on Homeland Security, H. Comm. on Appropriations* 111th Cong. (2009) (David Venturella, Executive Dir., Secure Communities, U.S. Immigration & Customs Enforcement), *available at* http://www.dhs.gov/ynews/testimony/testimony_1239800126329.shtm (reporting expected launch of a pilot program in which the fingerprints of all individuals on parole or probation will be run against DHS's immigration biometric database).

183 Spencer S. Hsu, *U.S. to Expand Immigration Checks to All Local Jails*, WASH. POST, May 19, 2009, *available at* http://www.washingtonpost.com/wpdyn/content/article/2009/05/18/AR2009051803172_pf.html.

184 *See supra* Sections II.C and II.C.1.c.

185 Fact Sheet, Executive Office for Immigration Review, U.S. Dep't of Justice, Type of Immigration Court Proceedings and Removal Hearing Process 1-2 (July 28, 2004). The decision to initiate removal proceedings is not subject to judicial review by any court. *See* INA § 242(g), 8 U.S.C. § 1252(g); Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 487 (1999). Prosecutorial discretion is the authority of a law enforcement agency to decide whether to enforce, or not to enforce, the law against an individual.

186 Memorandum from Doris Meissner, *supra* note 124, at 5.

of appeals), unnecessary removal proceedings or unnecessary litigation of legal and factual issues is particularly costly to the system.

As discussed below, the discretion of DHS officers not to initiate proceedings and DHS attorneys' discretion not to litigate issues does not appear to be exercised sufficiently to avoid unnecessary burdens on the removal adjudication system. This appears to be due in part to a lack of training and guidelines for DHS officers and attorneys, as well as the lack of tolerance for mistakes in judgment made in exercising discretion.

a. Immigration and Customs Enforcement Officers

ICE officers' decisions are guided by operation manuals, guidance from supervisors, and training. A 2007 GAO report concluded that ICE lacked comprehensive guidance for the exercise of officer discretion, particularly in determining whether to detain noncitizens with humanitarian circumstances or those who are not primary targets of ICE investigations.[187] In addition, ICE did not have an effective mechanism to ensure that officers are informed of legal developments that may affect decision making.[188]

In the context of increasing worksite enforcement, ICE officers have reported that their decisions to initiate removal actions are influenced by considerations of detention space and other resource availability factors.[189] Without clear institutional guidance, there is a persistent danger that ICE officers will exercise their discretion inconsistently, resulting in unfairness to individual noncitizens, overburdening of the detention and adjudication system, and/or inappropriate release of certain detainees.

b. Customs and Border Protection Officers

At CBP, there has been some improvement in training in recent years, as in 2007 the agency reportedly offered 37 courses and instituted national guidelines for a 12-week on-the-job training program for new officers at land ports of entry.[190] However, according to a 2007 GAO report, staffing shortfalls have forced managers at seven ports of entry to choose between performing port operations and providing the requisite training.[191] Moreover, CBP did not measure the extent to which it provided training to all who needed it and whether new officers demonstrated proficiency in required skills.[192]

Nearly 60% of non-supervisory staff have stated they are not satisfied with how CBP assesses their training needs, the extent to which supervisors support employee development, or the degree to which supervisors provide constructive feedback on how to improve.[193]

c. USCIS Officers in the Domestic Operations Directorate

As described in Section II.C.1.c, officers in USCIS's Domestic Operations Directorate ("DOD"), who handle immigration benefit applications, initiate removal proceedings by issuing, serving, and filing NTAs in connection with their review of benefit applications, and DOD officers make decisions regarding the issuance of NTAs on the basis of policies and procedures set forth in a memorandum dated July 11, 2006 from Michael L. Aytes, Associate Director for Domestic Operations.[194]

In this memorandum, Associate Director Aytes noted that there is an element of prosecutorial discretion to be exercised by DOD officers in issuing NTAs and that many cases will contain "special

187 GAO Immigration Enforcement Report, *supra* note 120, at 16-18.

188 *Id.* at 17.

189 *Id.* at 12.

190 U.S. Gov't Accountability Office, Border Security: Despite Progress, Weaknesses in Traveler Inspections Exist at Our Nation's Ports of Entry 8 (2007), *available at* http://www.gao.gov/new.items/d08219.pdf.

191 *Id*.

192 *Id*.

193 *Id.* at 41.

194 *See* USCIS Policy Memorandum No. 110, *supra* note 96.

circumstances that are not addressed by this memorandum."[195] Accordingly, USCIS attorneys are available to review all NTAs to be issued by DOD officers.[196] In addition, approval through appropriate channels is required before any DOD officer may deviate from the procedures set forth in this memorandum.[197]

USCIS recently established a nine-week BASIC training program, which includes a new hire orientation, classroom instruction, and an on-site, hands-on practicum. The learning objectives of this BASIC training program are:

> to build immigration expertise, foster a culture that honors public service, emphasize the significance of national security and public safety, underscore the human consequence involved in every USCIS decision, and cultivate the highest standards of professionalism and ethical conduct.[198]

In January 2008, the first group of students attended the BASIC training program, and more than 1,500 newly hired DOD officers participated in the BASIC training program in 2008.[199]

d. DHS Trial Attorneys

On October 24, 2005, DHS Principal Legal Advisor William J. Howard issued a memorandum directing all OPLA attorneys to apply principles of prosecutorial discretion in order to ensure that the Office's limited resources were used as judiciously as possible.[200] While acknowledging that OPLA attorneys lacked authority to cancel NTAs, the memorandum instructed OPLA attorneys to:

> attempt to discourage issuance of NTAs where there are other options available such as administrative removal, crewman removal, expedited removal or reinstatement, clear eligibility for an immigration benefit that can be obtained outside of immigration court, or where the desired result is other than a removal order.[201]

For cases in which an NTA has been issued but not yet filed with the immigration court, the memorandum directs OPLA attorneys to attempt to resolve the matter without filing the NTA. For cases where an NTA *has* been filed, the memorandum suggests that OPLA attorneys consider dismissing the proceedings without prejudice,[202] and also identifies ways in which OPLA attorneys might resolve a case, including not opposing relief, waiving appeal, making agreements to narrow the issues, or stipulating to the admissibility of evidence.[203]

For cases in which a court hearing has been held, the memorandum directs OPLA attorneys to exercise their prosecutorial discretion with regard to post-hearing actions, guided by the interests of judicial economy and fairness.[204] Finally, the memorandum states that even after a final order of removal, OPLA attorneys retain the discretion to determine if the proper course of action requires reopening the proceeding in order to terminate the NTA.[205]

Many believe that, despite internal policies requiring the exercise of prosecutorial discretion where appropriate, many DHS attorneys do not exercise prosecutorial discretion to promote efficiency or fairness in removal proceedings. A recent study concluded that "many interviewees believe that [DHS] Trial Attorneys

---

195 *Id.* at 1-2, 7.

196 *Id.*

197 *Id.*

198 U.S. Citizenship & Immigration Servs., *A Message from USCIS Director Emilio González*, USCIS MONTHLY, Feb. 2008, at 1, *available at* http://www.uscis.gov/files/nativedocuments/USCIS_Monthly_February_08.pdf.

199 *Id.*

200 Memorandum from William J. Howard, *supra* note 178, at 3.

201 *Id.*

202 *Id.* at 5 (citing 8 C.F.R. §§ 239.2(c), 1239.2(c)).

203 *Id.*

204 *Id.* at 6-7. For example, the memorandum urged OPLA attorneys to consider whether to appeal, what issues to appeal, and how to respond to a noncitizen's appeal.

205 *Id.* at 8.

invariably seek the worst outcome possible for the immigrant and unnecessarily drag out cases by litigating every issue, thereby undermining both the legitimacy and efficiency of Immigration Courts."[206] Some of our interviewees expressed similar views. For example, Jennifer Kim, a practitioner in New York City, described a DHS attorney who privately acknowledged that Ms. Kim's client had a good asylum case but insisted on opposing the applicant's claim before the immigration court. In addition, this DHS attorney refused to stipulate to any facts with respect to this claim.[207] A decision to refrain from any favorable exercise of prosecutorial discretion represents an inefficient use of the immigration adjudication system's resources and a failure to promote the interests of justice.

Some, however, disagree that DHS attorneys fail to exercise prosecutorial discretion when warranted. For example, Judge Bruce J. Einhorn, an immigration judge who retired in 2007, told us that, in his experience, DHS attorneys consistently stipulate to facts supporting adverse parties when appropriate, and that many DHS immigration attorneys are former clerks of immigration judges and therefore understand the importance of promoting fairness and efficiency in the adjudicatory process.[208]

While the precise extent of this problem can be debated, taking steps to encourage further the exercise of such prosecutorial discretion by DHS attorneys could certainly benefit the entire removal adjudication system.

B. Coordination Problems within DHS Lead to Inconsistent Positions

In the course of performing their respective immigration duties, USCIS, CBP, and ICE apply interrelated immigration laws and provisions.[209] Continuing statutory changes and unsettled issues of immigration law heighten the need for consistent legal positions within DHS. However, different DHS components have at times adopted inconsistent legal positions, generating confusion and additional, unnecessary litigation.

Inconsistency is illustrated in the determination of asylum issues, which are relevant to a significant portion of removal proceedings. USCIS, ICE, and CBP are all involved to some degree in asylum claims arising in expedited removal proceedings, but the immigration enforcement policies (and the actions of ICE trial attorneys, ICE officers, and CBP officers) are separated from oversight by officials who have a better understanding of our country's legal commitments in the treatment of refugees.[210] For example, some asylum seekers, who have been ruled by U.S. immigration courts to be "refugees" entitled to withholding of their removal, have been subjected to electronic monitoring under ICE's alternatives to detention programs instead of being released from detention without additional supervision.[211] Such electronic monitoring of refugees may be inconsistent with our nation's treaty obligations.[212]

---

206 Appleseed, Assembly Line Injustice: Blueprint to Reform America's Immigration Courts 16 (2009), *available at* http://www.appleseeds.net/Portals/0/Documents/Publications/Assembly%20Line%20Injustice.pdf.

207 Interview with Jennifer Kim.

208 Telephone Interview with Bruce J. Einhorn; *see also The Hard Line on Immigration: An NYU Law Roundtable Discussion*, 19 The Law School 25 (2009), *available at* http://www.law.nyu.edu/ecm_dlv3/groups/public/@nyu_law_website__publications__law_school_magazine/documents/documents/ecm_pro_062821.pdf (citing comments of Philip J. Costa, Deputy Chief Counsel, ICE, that he gets "frustrated when [he] hear[s] attorneys say that ICE does not exercise prosecutorial discretion, because [he] know[s] firsthand that it does so every day").

209 For example, USCIS applies inadmissibility grounds pursuant to the INA in evaluating applications for adjustment. Similarly, CBP applies such inadmissibility grounds in admissions decisions, and ICE applies such grounds in considering deportation charges based on the individual being inadmissible at the time of entry.

210 *See* Human Rights First, How to Repair the U.S. Asylum System: Blueprint for the Next Administration 4 (2008), *available at* http://www.humanrightsfirst.org/pdf/081204-ASY-asylum-blueprint.pdf.

211 Human Rights First, U.S. Detention of Asylum Seekers: Seeking Protection, Finding Prison 66-67 (2009), *available at* http://www.humanrightsfirst.org/pdf/090429-RP-hrf-asylum-detention-report.pdf.

212 In 1968, the United States acceded to the 1967 Protocol Relating to the Status of Refugees and became bound by the provisions of such Protocol and the 1951 Convention Relating to the Status of Refugees. Article 31 of the 1951 Convention Relating to the Status of Refugees provides that restrictions on the movement of refugees shall be limited only to those that are necessary, and in the view of the Executive Committee of the United Nations High Commissioner for Refugees, detention may be resorted to only: (1) to verify identity: (2) to determine the elements on which the claim for refugee status or asylum are based; (3) in cases where asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the state in which they intend to claim asylum; and (4) to protect national security or public order.

Another example of inconsistent application of immigration law by DHS components is in the handling of cases involving "material support" allegedly provided by noncitizens to "terrorist organizations," which causes such noncitizens to be inadmissible.[213] It has been broadly acknowledged that this terrorism-related bar applies to noncitizens who are neither terrorists nor pose any threat to the public safety, and Congress addressed this concern in 2005 and 2007 by granting broad waiver authority to the DHS Secretary and the Secretary of State, in consultation with the Attorney General.[214] While DHS, the State Department, and the Attorney General continue to work on implementing this waiver authority, noncitizens to whom the terrorism-related bar is applicable but who are potentially eligible for waivers are making immigration benefit applications and being placed in removal proceedings. To address this problem, USCIS implemented a policy of placing benefit applications on hold pending waiver implementation.[215] ICE, however, does not have such a policy. Accordingly, the applications of noncitizens who are potentially eligible for waivers that have not yet been implemented are being placed on hold by USCIS, while identically situated noncitizens in removal proceedings are not being considered for waivers at all,[216] and some ICE trial attorneys have actively opposed adjourning or administratively closing such noncitizens' cases.[217]

C. Removal on the Ground of an Aggravated Felony Conviction Has Expanded to Include Minor Crimes, Burdened the Adjudication System, and Deprived Many Noncitizens of Access to Court Review

Section 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii), provides that a person is removable if he or she has been convicted of an "aggravated felony," and section 101(a)(43), 8 U.S.C. § 1101(a)(43), sets forth the definition of aggravated felony. The scope of this ground for removal has broadened dramatically since 1990 and especially since 1996. Moreover, noncitizens who are subject to this provision can be removed through a streamlined administrative procedure without recourse to the immigration courts if they are not LPRs. The combination of these developments has given rise to two sets of issues for the removal adjudication system: (1) additional burdens on the system created by sweeping in persons convicted of relatively minor crimes; and (2) the potential denial of fairness or due process for those subject to the administrative removal regime.

1. Expanded Ground for Removal for an Aggravated Felony Conviction

The term "aggravated felony" was first added to the INA as a ground for deportation in the Anti-Drug Abuse Act of 1988.[218] This covered a narrow list of crimes, including "murder, any drug trafficking crime . . . , or any illicit trafficking in firearms or destructive devices [committed in the United States], or any attempt or conspiracy to commit any such act."[219]

213 *See* INA § 212(a)(3), 8 U.S.C. § 1182(a)(3).

214 *Compare* INA § 212(d)(3)(B), 8 U.S.C. § 1182(d)(3)(B) (2000), *with* INA § 212(d)(3)(B), 8 U.S.C. § 1182(d)(3)(B) (2006).

215 *See generally* Memorandum from Michael Aytes, Acting Deputy Dir., U.S. Citizenship & Immigration Servs., to Field Leadership, Revised Guidance on the Adjudication of Cases Involving Terrorist-Related Inadmissibility Grounds and Amendment to the Hold Policy for Such Cases (Feb. 13, 2009), *available at* http://www.uscis.gov/files/nativedocuments/terror-related_inadmissibility_13feb09.pdf; Memorandum from Jonathan Scharfen, Deputy Dir., U.S. Citizenship & Immigration Servs., to Assoc. Dirs., Chief, Office of Admin. Appeals, & Chief Counsel, Withholding Adjudication and Review of Prior Denials of Certain Categories of Cases Involving Association with, or Provision of Material Support to, Certain Terrorist Organizations or Other Groups (Mar. 26, 2008), *available at* http://www.uscis.gov/files/nativedocuments/Withholding_26Mar08.pdf.

216 *See* Fact Sheet, U.S. Citizenship & Immigration Servs., Department of Homeland Security Implements Exemption Authority for Certain Terrorist-Related Inadmissibility Grounds for Cases with Administratively Final Orders of Removal (Oct. 23, 2008), *available at* http://www.uscis.gov/files/article/FACT%20SHEET%20DHS%20Exemption%20Authority%2020081023.pdf.

217 *See* HUMAN RIGHTS FIRST, DENIAL AND DELAY: THE IMPACT OF THE IMMIGRATION LAW'S "TERRORISM BARS" ON ASYLUM SEEKERS AND REFUGEES IN THE UNITED STATES 58 (2009), *available at* http://www.humanrightsfirst.info/pdf/RPP-DenialandDelay-FULL-111009-web.pdf (reporting that ICE's motion in a removal proceeding noted that although cases involving terrorist-related bars are on hold with USCIS, "the ICE/OPLA directive is to move forward with such cases such as the respondent's. As the respondent is not eligible for any of the exemptions in place at this time . . . there is no reason to continue this case indefinitely.").

218 Pub. L. No. 100–690, 102 Stat. 4181 (eff. Nov. 18, 1988).

219 Pub. L. No. 100–690, §§ 7342, 7344(a), 102 Stat. at 4469-4471.

The Immigration Act of 1990[220] added to the list of aggravated felonies lesser drug crimes and crimes of violence with terms of imprisonment of five years or more.[221] It also made persons imprisoned for more than five years for aggravated felonies ineligible for a waiver of deportation (which previously had been available under section 212(c)), suspension of deportation, voluntary departure, asylum, and withholding of deportation.

In the Immigration and Nationality Technical Corrections Act of 1994, the definition of "aggravated felony" was expanded still further, to include additional, less-serious crimes, including fraud, burglary, and theft.[222]

Pursuant to the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Congress substantially broadened the aggravated felony provisions to include:

- Committing RICO offenses for which a sentence of five years or more might be imposed;
- Owning, controlling, managing, or supervising a prostitution business, regardless of the actual sentence imposed;
- Noncitizen-smuggling for which a sentence of five years or more was imposed;
- Altering a passport or other instrument in violation of 18 U.S.C. § 1543, where a term of imprisonment of 18 months or more was imposed;
- Failing to appear for service of a sentence, if the underlying offense was punishable by imprisonment for a term of five years or more;
- Engaging in commercial bribery, counterfeiting, forgery, or trafficking in vehicle identification numbers, for which a sentence of five years may be imposed;
- Committing an offense relating to obstruction of justice, perjury, subornation of perjury, bribery of a witness for which a sentence of five years may be imposed; and
- Failing to appear on charges carrying a sentence of up to two years of imprisonment.[223]

AEDPA also eliminated section 212(c) relief for LPRs removable on the ground of aggravated felony convictions, barring an immigration court from considering the hardship caused by deportation, such as family ties, length of residence, rehabilitation, service in the armed forces, history of employment, community service, and hardship to family members caused by deportation.

That same year, IIRIRA reduced the sentence required for defining many of the listed crimes as an "aggravated felony" from five years to one year and reduced the monetary threshold for convictions for fraud, deceit, and tax evasion.[224] In addition, IIRIRA provided for the retroactive application of the aggravated felony definition, as modified by IIRIRA.[225] Thus, a pre-1988 conviction of a crime that was not a basis for removal at the time of conviction but falls within the current definition of an aggravated felony is grounds for removal.[226]

Finally, IIRIRA stripped all judicial review of orders of removal arising from aggravated felony

---

220 Pub. L. No. 101–649, §§ 501 and 602, 104 Stat. 4978, 5048 and 5077-80 (eff. Nov. 29, 1990).

221 The statute defined "crime of violence" as an "offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another" or one that "involves a substantial risk that physical force against the person or property of another may be used in the course of committing an offense." 18 U.S.C. § 16.

222 Pub. L. No. 103–416, § 222, 108 Stat. 4305, 4320-22 (eff. Oct. 25, 1994).

223 Pub. L. No. 104–132, § 440(e), 110 Stat. 1214, 1277-78 (eff. April 24, 1996).

224 IIRIRA § 321(a), 110 Stat. at 3009-627-28.

225 IIRIRA § 321(b), 110 Stat. at 3009-628 (amending the definition of aggravated felony in INA § 101(a)(43), 8 U.S.C. § 1101(a)(43), to add at the end of such definition "[n]otwithstanding any other provision of law (including any effective date), the [aggravated felony] term applies regardless of whether the conviction was entered before, on, or after the date of enactment of this paragraph.").

226 Although section 7344(b) of the Anti-Drug Abuse Act of 1988 provided that the aggravated felony deportation ground at INA § 241(a)(4)(B), 8 U.S.C. § 1251(a)(4)(B) (1988), only applied to noncitizens convicted on or after the date of its enactment (i.e., November 1, 1988), section 602 of the Immigration Act of 1990 has been interpreted as superseding the effective date restriction set forth in section 7344(b) of the Anti-Drug Abuse Act of 1988. *See* Gelman v. Ashcroft, 372 F.3d 495 (2d Cir. 2004); Lettman v. Reno, 207 F.3d 1368 (11th Cir. 2000); Lewis v. INS, 194 F.3d 539 (4th Cir. 1999); *In re* Truong, 22 I. & N. Dec. 1090 (BIA 1999).

convictions,[227] and drastically altered the consequences of an aggravated felony conviction (which are described in Section III.C.1.a below).

In many cases, courts called upon to construe the aggravated felony provisions are led by the broad statutory language to seemingly nonsensical results. For example, in *United States v. Pacheco*,[228] a long-term permanent resident who had entered the United States legally as a six-year-old child was convicted, *before* IIRIRA was passed, of three misdemeanor offenses in Rhode Island state court, resulting in three different suspended one-year sentences. State misdemeanor offenses are not felonies, much less "aggravated felonies." The Second Circuit expressed "'misgivings' that Congress, in its zeal to deter deportable noncitizens from re-entering this country, has 'improvidently, if not inadvertently, broken the historic line of division between felonies and misdemeanors,'"[229] but still held that these misdemeanor convictions were "aggravated felonies" as defined under the INA. In other cases, the Courts of Appeals have affirmed the expansive reach of the term "aggravated felony," while expressing reservations about the irrational results.[230]

In litigation, DHS and DOJ have sought to expand the sweep of "aggravated felony" even beyond the already broad definition written into the statute. In some instances, courts have rejected such expanded interpretations. For example, the Supreme Court has held that a state court conviction of driving under the influence of alcohol and causing serious bodily injury was not a "crime of violence" under federal criminal law.[231] The Court also held that a conviction of a state criminal offense is not a "felony punishable under the Controlled Substance Act" and cannot be considered an aggravated felony conviction unless it involves conduct that would be a felony under federal law.[232] In other instances, the circuit courts have split on whether to accept DOJ's reading of the term "aggravated felony," such as on the question whether multiple state court convictions for simple possession of marijuana amount to an aggravated felony conviction under a theory of recidivism.[233]

a. Consequences of an Aggravated Felony Conviction

Because Congress considers aggravated felonies to be "the most serious criminal offenses" covered by U.S. immigration laws,[234] noncitizens who are removed on the ground of aggravated felony convictions are subject to consequences that are more severe than if they were removed on a different basis. These include:

- *Mandatory detention* during removal proceedings based on his or her aggravated felony conviction;[235]
- *Ineligibility for relief from removal*, including cancellation of removal, voluntary departure, and asylum;[236]

227 IIRIRA § 306, 110 Stat. at 3009-607-12. Subsequently, the Supreme Court held that this provision did not repeal the federal courts' habeas jurisdiction under 28 U.S.C. § 2241. INS v. St. Cyr, 533 U.S. 289, 314 (2001).

228 225 F.3d 148 (2d Cir. 2000).

229 *Id.* at 153 (quoting United States v. Graham, 169 F.3d 787, 787 (3d Cir. 1999)).

230 For example, in *United States v. Graham*, 169 F.3d 787 (3d Cir. 1999), the Third Circuit, describing the aggravated felony provisions as "carelessly drafted," nonetheless affirmed an aggravated felony designation for a defendant convicted of the misdemeanor crime of petty larceny. *Id.* at 793. Similarly, in 2001, the Eleventh Circuit upheld an aggravated felony designation based on a conviction for a misdemeanor shoplifting crime, but noted the law was "breaking the time-honored line between felonies and misdemeanors." United States v. Christopher, 239 F.3d 1191, 1194 (11th Cir. 2001).

231 Leocal v. Ashcroft, 543 U.S. 1, 11-12 (2004).

232 Lopez v. Gonzales, 549 U.S. 47, 60 (2006).

233 *Compare* Alsol v. Mukasey, 548 F.3d 207 (2d Cir. 2008); Rashid v. Mukasey, 531 F.3d 438 (6th Cir. 2008); Berhe v. Gonzales, 464 F.3d 74 (1st Cir. 2006); Steele v. Blackman, 236 F.3d 130 (3d Cir. 2001), *with* United States v. Cepeda-Rios, 530 F.3d 333 (5th Cir. 2008) (per curiam) (following United States v. Sanchez-Villalobos, 412 F.3d 572 (5th Cir. 2005)); United States v. Pacheco-Diaz, 506 F.3d 545 (7th Cir. 2007), *reh'g denied*, 513 F.3d 776 (7th Cir. 2008) (per curiam); Fernandez v. Mukasey, 544 F.3d 862 (7th Cir. 2008). The Supreme Court recently granted certiorari to consider the issue of whether a second misdemeanor drug possession conviction is an aggravated felony. Carachuri-Rosendo v. Holder, 2009 WL 2058154 (Dec. 14, 2009) (No. 09-60).

234 H.R. REP. NO. 109-345(I), at 69 (2005).

235 Demore v. Kim, 538 U.S. 510, 513 (2003) (holding that the mandatory detention provisions affecting noncitizens in removal proceedings because of an alleged conviction for an aggravated felony is constitutional).

236 INA § 240A(a)(3), 8 U.S.C. § 1229b(a)(3) (cancellation of removal); INA § 240B(b)(1)(C), 8 U.S.C. § 1229c(b)(1)(C) (voluntary departure); and INA § 208(b)(2)(A)(ii), B(i), 8 U.S.C. § 1158(b)(2)(A)(ii), (B)(i) (asylum). In addition, a person convicted of an aggravated felony who has been sentenced to an aggregate term of imprisonment of at least five years is ineligible for withholding of removal under section 241(b)(3).

- *Lifetime bar to reentry* into the United States;[237]
- *Bar to naturalization*, since a person convicted of an aggravated felony cannot satisfy the good moral character requirement for becoming a citizen, even if he or she served honorably in the armed forces during wartime;[238]
- *Ineligibility for relief under the Violence Against Women Act* ("VAWA");[239] and
- *Administrative removal* of non-LPRs.

b. Problems Arising from Expansion of Removal on the Ground of an Aggravated Felony Conviction

The expansion of the aggravated felony conviction ground for removal discussed above is a source of significant burdens on the removal adjudication system in at least four ways. First, removal proceedings brought on aggravated felony grounds have increased greatly since enactment of the aggravated felony provisions in 1988. The number of such removal orders more than doubled from 10,303 in 1992 to 26,074 in 2005. From mid-1997 to May 2006, removal proceedings on the ground of aggravated felony charges were initiated against 156,713 noncitizens in immigration courts.[240] In the 12-month period that ended September 30, 2007, ICE placed 164,000 noncitizens with criminal convictions in removal proceedings, a sharp increase from the 64,000 the year before.[241]

Second, there is a significant amount of litigation in the immigration adjudication system,[242] including appeals to the federal courts, related to removal orders issued on the ground of aggravated felony convictions.[243] This litigation likely stems from a number of factors, including the harsh consequences of

---

237 INA § 212(a)(9)(A)(i)-(ii), 8 U.S.C. § 1182(a)(9)(A)(i)-(ii).

238 *See, e.g.*, INA § 101(f)(8), 8 U.S.C. § 1101(f)(8); Boatswain v. Gonzales, 414 F.3d 413, 414 (2d Cir. 2005) (holding that an aggravated felony conviction precludes the finding of "good moral character" necessary for naturalization not only under 8 U.S.C. § 1427, the general naturalization statute, but also under 8 U.S.C. § 1440, a statute that eases naturalization requirements for certain U.S. veterans).

239 Under VAWA, abused spouses and their children or abused children and their parents may petition for LPR status without the cooperation of their respective abusers (who are U.S. citizens or LPRs). INA § 204(a)(1)(A)-(B), 8 U.S.C. § 1154(a)(1)(A)-(B). A VAWA applicant, however, is required to demonstrate good moral character, which is precluded by the aggravated felony conviction. INA § 204(a)(1)(A)-(B), 8 U.S.C. § 1154(a)(1)(A)-(B); 8 C.F.R. §§ 204.2(c)(1)(i)(F), (c)(1)(vii) ("A self-petitioner will be found to lack good moral character if he or she is a person described in section 101(f)," which includes a person "who at any time has been convicted of an aggravated felony.").

240 Transactional Records Access Clearinghouse, Syracuse University, New Data on the Processing of Aggravated Felons (2007) [hereinafter TRAC Aggravated Felon Procedures], *available at* http://trac.syr.edu/immigration/reports/175/; Transactional Records Access Clearinghouse, Syracuse University, How Often is the Aggravated Felony Statute Used? (2006) [hereinafter TRAC Aggravated Felon Data], *available at* http://trac.syr.edu/immigration/reports/158/. The data presented include all recorded cases in the immigration courts from mid-1997 until May 2006 in which noncitizens were charged under the aggravated felony provisions of the INA. The Transactional Records Access Clearinghouse obtained this data pursuant to a Freedom of Information Act request.

241 Ernesto Londoño, *U.S. Steps up Deportation of Immigrant Criminals*, Wash. Post, Feb. 27, 2008, at A1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/02/26/AR2008022603705.html.

242 There has been a surge in appellate litigation related to removal proceedings since the enactment of IIRIRA in 1996, which, among other things, broadened the aggravated felony ground for removal and curtailed the availability of discretionary relief. *See* John R.B. Palmer, Stephen W. Yale-Loehr & Elizabeth Cronin, *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 Geo. Immig. L.J. 1 (2005); John R.B. Palmer, *The Nature and Causes of the Immigration Surge in the Federal Courts of Appeals: A Preliminary Analysis*, 51 N.Y.L. Sch. L. Rev. 13 (2006). The Department of Justice reported that in the seven years prior to April 1, 1997, an average of 12,043 cases were appealed each year by noncitizens from the administrative level to the Board of Immigration Appeals, as compared to an average of 22,629 cases appealed each year in the seven years after April 1, 1997. Human Rights Watch, Forced Apart: Families Separated and Immigrants Harmed by United States Deportation Policy 28 (2007), *available at* http://www.hrw.org/sites/default/files/reports/us0707_web.pdf.

243 The circuit courts decided at least 76 cases related to aggravated felonies in the immigration context in the 90-day period ended December 23, 2009. *See, e.g.*, Walker v. Holder, 2009 WL 4725237 (1st Cir. 2009); Pierre v. Holder, 2009 WL 4576054 (2d Cir. 2009); Reyes-Vara v. Holder, 2009 WL 4302430 (4th Cir. 2009); N-A-M v. Holder, 2009 WL 3949130 (10th Cir. 2009); Deavila v. Holder, 2009 WL 3929909 (5th Cir. 2009); Lemanski v. Att'y Gen of the United States, 2009 WL 3838281 (3rd Cir. 2009); Ruiz v. Holder, 2009 WL 3833979 (5th Cir. 2009); Bharti v. Holder, 2009 WL 3816967 (5th Cir. 2009); Stanley v. Holder, 2009 WL 3780705 (5th Cir. 2009); De Leon-Castro v. Holder, 2009 WL 3780683 (5th Cir. 2009); Martinez-Valero v. Holder, 2009 WL 3780708 (5th Cir. 2009); Diaz-Saenz v. Holder, 2009 WL 3780717 (5th Cir. 2009); Laguna-Hernandez v. Holder, 2009 WL 3786077 (5th Cir. 2009); Kerr v. Holder, 2009 WL 3753528 (5th Cir. 2009); Shaya v. Holder, 586 F.3d 401 (6th Cir. 2009); Lopez de Garcia v. Holder, 2009 WL 3747479 (9th Cir. 2009); Garbutt v. Holder, 2009 WL 3634336 (7th Cir. 2009); Okechukwu Osuagwu v. Holder, 2009 WL 3634432 (5th Cir. 2009); Douglas v. Holder, 2009 WL 3614535 (5th Cir. 2009); Simpson v. Holder, 2009 WL 3524929 (5th Cir.

Footnote 243 continued on page 1-34

a removal order based on an aggravated felony conviction, but a probable key factor is the broad and vague definition of "aggravated felony" in the INA.[244]

Third, the mandatory detention requirement imposes significant costs on the immigration adjudication system and adversely affects the ability of such noncitizens to defend themselves from removal.[245]

Fourth, the bar on any discretionary relief or consideration of equities for LPRs removable on the ground aggravated felony convictions, combined with the significant expansion in the number of offenses, including minor offenses, that qualify as aggravated felonies, has resulted in the automatic removal of thousands of LPRs with extensive ties to the United States, and the attendant family and societal disruption. According to the Transaction Research Access Clearinghouse at Syracuse University, the individuals charged from 2002 through 2006 as removable on the ground of aggravated felony convictions were persons who had resided in the United States for an average of 15 years. The longest stay in the country before being charged was 54 years. In addition, 45% of these individuals reported that they spoke English.[246] These data suggest that most of those placed in removal proceedings on the ground of aggravated felony convictions have strong connections with the United States and spouses and children who are often either U.S. citizens or LPRs.[247]

When a noncitizen is removed on the ground of an aggravated felony conviction and has family members who are U.S. citizens or LPRs, either those U.S. citizen or LPR family members are effectively deported or they elect to remain in the United States, often resulting in the permanent division of the family and the loss of a breadwinner for the family.[248]

2. Administrative Removal Procedures for Non-Lawful Permanent Residents Alleged to be Removable on the Ground of Aggravated Felony Convictions

If DHS reasonably believes that a noncitizen is removable on the ground of an aggravated felony

Footnote 243 continued from page 1-33

2009); Ata v. Holder, 2009 WL 3525739 (5th Cir. 2009); Hamilton v. Holder, 584 F.3d 1284, 2009 WL 3430121 (10th Cir. 2009); Krupic v. Holder, 2009 WL 3416211 (2nd Cir. 2009); Esmaili v. Holder, 2009 WL 3345768 (5th Cir. 2009); Lucero-Carrera v. Holder, 2009 WL 3287541 (10th Cir. 2009); Mosqueda-Masiel v. Holder, 2009 WL 3270926 (5th Cir. 2009); Aguilar-Turcios v. Holder, 582 F.3d 1093 (9th Cir. 2009). As a result of litigation among the circuit courts regarding the aggravated felony provisions of the INA, splits developed, and the Supreme Court has resolved four such splits in the last five years. *See, e.g.*, Nijhawan v. Mukasey, 129 S. Ct. 2294, 2303 (2009) (permitting immigration judges to look beyond the record of conviction and consider a noncitizen's sentencing stipulation and restitution order to determine whether a fraud or deceit conviction meets the necessary monetary threshold to be an aggravated felony); Gonzales v. Duenas-Alvarez, 549 U.S. 183, 188-89 (2007) (finding that a state law conviction of aiding or abetting a theft falls within the scope of the generic definition of a theft offense and is, therefore, an aggravated felony); Lopez v. Gonzales, 549 U.S. 47, 60 (2006) (holding that a state drug possession conviction that is a misdemeanor under federal law is not an aggravated felony conviction); Leocal v. Ashcroft, 543 U.S. 1, 11-12 (2004) (finding that a drunken driving conviction is not an aggravated felony conviction). The Supreme Court recently granted certiorari to consider the issue of whether a second misdemeanor drug possession conviction is an aggravated felony. Carachuri-Rosendo v. Holder, 2009 WL 2058154 (Dec. 14, 2009) (No. 09-60).

244 *See* Lenni B. Benson, *Making Paper Dolls: How Restrictions on Judicial Review and the Administrative Process Increase Immigration Cases in the Federal Courts*, 51 N.Y.L. Sch. L. Rev. 37, 50-51 (2006) (noting that attorneys are now more likely to advise their clients to contest removability on the ground of an aggravated felony conviction given the severe consequences of conceding this allegation and the lack of discretionary relief and contrasting this with the past practice of many immigration attorneys of advising clients to concede removability and instead seek discretionary relief from removal).

245 *See infra* Section III.G.

246 TRAC Aggravated Felon Data, *supra* note 240. These data and calculations were derived from data provided by EOIR for 156,713 noncitizens in removal proceedings on the ground of aggravated felony convictions. Entry or removal charge dates were missing on 24,525 of these individuals; accordingly, they are not included in the relevant calculations.

247 Human Rights Watch estimated that at least 1.6 million family members have been separated from the 672,593 noncitizens so removed since 1997 and that approximately 540,000 of these family members were U.S. citizens. Human Rights Watch, *supra* note 242, at 44. The Pew Hispanic Center reported that in 2008 there were approximately 8.8 million people in the United States in mixed-status families with at least one unauthorized noncitizen parent and one U.S. born child, representing 53% of the nation's unauthorized noncitizens and their family members. Jeffrey S. Passel & D'Vera Cohn, Pew Hispanic Center, A Portrait of Unauthorized Immigrants in the United States 8 (2009), *available at* http://pewhispanic.org/files/reports/107.pdf.

248 The reasons for remaining in the United States under these circumstances include: (1) to avoid disrupting the lives of minor children, who often do not speak any language other than English and consider themselves to be Americans; (2) to educate minor children in the United States, which offers expanded educational opportunities; (3) to avoid economic deprivation for minor children; and (4) to ensure the physical safety of minor children. *See* Dorsey & Whitney LLP, Severing a Lifeline: The Neglect of Citizen Children in America's Immigration Enforcement Policy 5-6 (2009), *available at* http://www.dorsey.com/files/upload/DorseyProBono_SeveringLifeline_web.pdf.

conviction and this person: (1) *is not* a lawful permanent resident; or (2) *is* a conditional permanent resident[249] at the time the removal process begins, then DHS may[250] use a streamlined administrative procedure to remove such noncitizen without a hearing before an immigration judge.[251]

This administrative removal process begins when a DHS officer serves a Notice of Intent to Issue a Final Administrative Deportation Order ("Notice of Intent") on a noncitizen charged as being removable on the ground of an aggravated felony conviction. Service of a Notice of Intent can occur after the noncitizen has been released from prison or during incarceration in the United States for the criminal conviction. The Notice of Intent functions as the charging document and includes allegations of fact and conclusions of law.[252]

Upon receiving the Notice of Intent, the noncitizen may request to review the supporting evidence and, after reviewing the evidence, has ten days to rebut the charges. At this stage, a noncitizen may be represented by a lawyer, but counsel will not be provided by the government.[253] After ten days have elapsed, a Deciding Service Officer — essentially any DHS officer other than the one who issued the Notice of Intent — will review the Notice of Intent, the supporting evidence, and any rebuttal provided by the noncitizen, and may then:

- issue a final administrative removal order;
- request additional evidence to resolve a material issue of fact; or
- terminate the administrative proceeding and issue an NTA to initiate removal proceedings in immigration court in cases where it becomes clear that administrative removal procedures are inappropriate.[254]

If the Deciding Service Officer issues a final administrative removal order, then DHS will not execute the order until at least 14 days have elapsed to permit the noncitizen an opportunity to apply for judicial review pursuant to section 242 (unless this requirement is waived by the noncitizen).[255]

Such judicial review, however, is very limited.[256] For most purposes, IIRIRA deprived the federal courts of jurisdiction to review a final administrative removal order if the noncitizen is removable on the ground of an aggravated felony conviction, although a court may review the threshold question of whether the person has been convicted of an offense that deprives the court of jurisdiction.[257]

For this reason and because the entire administrative removal process is closed to the public, one cannot assess systematically the quality of these adjudications, including whether the Deciding Service Officers' determinations and orders are consistent with applicable law, which is complicated and evolving.

The percentage of aggravated felony removal orders handled by the streamlined administrative removal procedures, rather than the immigration courts, increased from 43% in 2002 to 55% in 2006.[258] This trend signals a shift toward a removal system in

---

249 A conditional permanent resident ("CPR") is a noncitizen granted temporary permanent resident status on the basis of a marriage with a U.S. citizen or LPR less than two years before the interview with USCIS or the U.S. consulate, as applicable. A CPR may be the spouse of a U.S. citizen or LPR or may be the child of such a spouse. A CPR is eligible to become an LPR after two years have elapsed, but if the CPR fails to timely file a petition to remove the conditions to his or her CPR status, then CPR status will be lost. INA § 216, 8 U.S.C. § 1186a.

250 DHS is not required to use the streamlined administrative removal procedure and may serve an NTA on the noncitizen and initiate removal proceedings on the same grounds in the immigration court. In some circumstances, it may be possible to persuade a DHS officer to issue an NTA, rather than use the streamlined administrative removal procedures, when the legal issues are expected to be difficult.

251 INA § 238(b), 8 U.S.C. § 1228(b).

252 8 C.F.R. § 238.1.

253 *Id.*

254 *Id.*

255 INA § 238(b)(3), 8 U.S.C. § 1228(b)(3); 8 C.F.R. § 238.1(f).

256 INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C).

257 *See, e.g.*, Bovkun v. Ashcroft, 283 F.3d 166, 167-68 (3d Cir. 2002) ("[W]e may properly review the threshold question whether a petitioner has been convicted of an offense that deprives us of jurisdiction."). The courts also retain jurisdiction where an appeal from an administrative removal order is based on constitutional claims, such as a lack of procedural due process. *See, e.g.*, Graham v. Mukasey, 519 F.3d 546, 549 (6th Cir. 2008) (addressing claims of denial of procedural due process in the decision to issue an administrative order of removal based on petitioner's aggravated felony conviction for mail fraud).

258 TRAC AGGRAVATED FELON PROCEDURES, *supra* note 240.

which DHS is responsible for all steps in the process, from apprehension and detention to issuing the order and deporting the individual.[259]

This shift raises a number of concerns. First, the authority granted DHS to interpret and enforce the removal provisions for non-LPRs charged with removal on the ground of aggravated felony convictions is very broad. Without judicial review, there is no external check to ensure that DHS has correctly applied the law. And, in view of the positions taken by DOJ and DHS in recent litigation,[260] the delegation of authority to identify noncitizens who are removable on the ground of aggravated felony convictions and for whom administrative removal procedures are appropriate and then to decide their cases — all without review or oversight by the courts — is too great a delegation.

In addition, non-attorney DHS officers are not competent to adjudicate the multiple, complex legal issues that may be involved in determining whether a particular conviction constitutes an aggravated felony. It is widely acknowledged that whether a criminal offense is an aggravated felony can be, relative to other legal questions, an extremely complex and volatile area of law.[261] To adjudicate competently a removal case on the ground of an aggravated felony conviction, an adjudicator must:

- maintain an up-to-date understanding of the law of the governing circuit court and BIA;
- apply this law, often by analogy, to the elements of a particular criminal statute;
- apply the analytical and evidentiary rules set out in the categorical approach, as it is interpreted by the governing circuit court and BIA, which itself involves multiple legal determinations; and
- correctly analyze the criminal court documents in the individual's criminal record.

Therefore, an administrative removal procedure that authorizes non-attorney DHS officers to adjudicate highly complex and difficult issues of law, without any judicial or administrative review, raises due process concerns, which are especially troubling because the

259 *Id.*

260 The Supreme Court rejected the government's interpretation of the meaning of "aggravated felony" in the immigration context in certain cases in which the government's interpretations differ significantly from the common meanings of aggravated felony terms. *See* Lopez v. Gonzales, 549 U.S. 47, 56 (2006) ("But we do not normally speak or write the Government's way."); Leocal v. Ashcroft, 543 U.S. 1, 11 (2004) ("[W]e cannot forget that we ultimately are determining the meaning of the term "crime of violence.'"). In addition, noncitizens have successfully challenged the Government's application of the aggravated felony removal provisions. *See, e.g.*, Nguyen v. Holder, 571 F.3d 524, 530-31 (6th Cir. 2009) (finding that auto theft in violation of California law is not an aggravated felony because it does not, by its nature, involve a "substantial risk" that physical force against the person or property of another may be used in the course of committing the offense and therefore does not constitute a "crime of violence"); Martinez v. Mukasey, 551 F.3d 113, 120 (2d Cir. 2008) (holding that the sale of marijuana in the fourth degree in violation of New York law is not a drug trafficking aggravated felony because the offense punishes non-remunerative distribution of as little as two grams of marijuana); Alsol v. Mukasey, 548 F.3d 207, 217 (2d Cir. 2008) (explaining that a subsequent conviction under New York State law for simple possession is not an aggravated felony because "the fact of recidivism must be reflected in the conviction the government seeks to classify as an aggravated felony, not merely in petitioner's underlying conduct"); Evanson v. Attorney General, 550 F.3d 284, 289-90 (3d Cir. 2008) (holding that a conviction for marijuana possession with intent to deliver under Pennsylvania law is not necessarily an aggravated felony because the statute punishes distribution of a small amount of marijuana without remuneration, which is neither a federal felony, nor a drug trafficking offense), *following* Steele v. Blackman, 236 F.3d 130, 137 (3d Cir. 2001); Rashid v. Mukasey, 531 F.3d 438, 448 (6th Cir. 2008) (finding that a Michigan conviction of possession of a controlled substance, where the defendant has a prior conviction for the same offense, is not an aggravated felony); Jimenez-Gonzalez v. Mukasey, 548 F.3d 557 (7th Cir. 2008) (holding that the reckless shooting of a firearm into an inhabited dwelling in violation of Indiana statute is not an aggravated felony crime of violence because recklessness is insufficient mens rea); LaGuerre v. Mukasey, 526 F.3d 1037, 1039 (7th Cir. 2008) (per curiam) (rejecting DHS's argument that the court should go beyond the elements of the offense to determine whether a state conviction constituted an aggravated felony crime of violence); Salazar-Luviano v. Mukasey, 551 F.3d 857, 863 (9th Cir. 2008) (explaining that aiding escape from custody under 18 U.S.C. § 751 is not an aggravated felony as "obstruction of justice" because the offense does not contain all of the elements of any of the federal offenses in the BIA's own definition of obstruction of justice); Penuliar v. Mukasey, 528 F.3d 603 (9th Cir. 2008) (finding that a felony conviction for driving a vehicle with wanton disregard while fleeing a police officer in violation of California law, where intent was provable by having three prior traffic violations, is not an aggravated felony crime of violence); Mandujano-Real v. Mukasey, 526 F.3d 585, 590-91 (9th Cir. 2008) (holding that identity theft that does not deprive anyone of ownership is not aggravated felony "theft"); Tostado v. Carlson, 481 F.3d 1012, 1015 (8th Cir. 2007) (finding that convictions for the unlawful possession of cocaine and cannabis under Illinois law are not aggravated felonies); Jordison v. Gonzalez, 501 F.3d 1134 (9th Cir. 2007) (stating that a conviction for "recklessly set[ting] fire to . . . a structure or forest land" in violation of California law is not an aggravated felony crime of violence because it does not necessarily involve violence or potential violence against any other person or his or her property).

261 For a recent review of some of the complexities involved in analyzing deportation based on criminal convictions in general, see Rebecca Sharpless, *Toward a True Elements Test: Taylor and the Categorical Analysis of Crimes in Immigration Law*, 62 U. Miami L. Rev. 979 (2008). Due in part to these complexities, whether a criminal offense constitutes an aggravated felony is a heavily litigated issue in the federal court system, and the courts of appeals issue dozens of decisions each year on this topic, which often conflict. *See supra* note 243 and note 260.

stakes to non-LPRs and their U.S. citizen and LPR family members are quite high and because many misdemeanors are charged as aggravated felonies.

Second, an administrative removal procedure fails to inspire confidence in the fairness of our removal adjudication system, which is a necessary condition to noncitizens' submission to, and general compliance with, our immigration adjudication system.

Third, providing one type of proceeding for lawful permanent residents (in the immigration courts) and a different type of proceeding for other noncitizens (through an administrative process) cannot be justified on the basis that LPRs are more closely connected to the United States by family ties.[262] Although LPRs against whom removal proceedings are initiated on the ground of alleged aggravated felony convictions are likely to be long-time residents of the United States who have close family members who are U.S. citizens or LPRs,[263] this is also likely to be the case for non-LPRs against whom removal proceedings are initiated on the ground of alleged aggravated felony convictions.[264]

Finally, the ten-day period allowed to rebut a Notice of Intent makes it difficult to present an effective rebuttal, given that noncitizens with convictions for aggravated felonies are subject to mandatory detention and are often held in facilities where obtaining access to a lawyer, or court records to demonstrate that a conviction is not that of an aggravated felony, is difficult, if not impossible.[265]

D. Removal on the Ground of a Conviction of a Crime Involving Moral Turpitude Has Expanded to Include Misdemeanor Convictions and Has Burdened the Adjudication System

A noncitizen is removable if, within five years after his or her admission into the United States, he or she has been convicted of a "crime involving moral turpitude" for which a sentence of one year or longer may be imposed.[266] The INA does not define "crime involving moral turpitude," and the meaning of this term has been determined by administrative and judicial interpretations. The BIA has defined moral turpitude as "conduct that shocks the public conscience as being 'inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general.'"[267] Courts have held that crimes involving moral turpitude encompass a wide range of crimes, including minor offenses, such as shoplifting and turnstile jumping in subways,[268] but there are some circuit splits regarding whether specific crimes involve moral turpitude.[269]

The following table sets forth the number of removal proceedings in the immigration courts in which noncitizens were charged as being removable on the grounds of convictions for crimes involving moral turpitude in each of the fiscal years 1996 through 2006:[270]

---

262 As the Supreme Court has noted, LPRs "like citizens, pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society." *See In re* Griffiths, 413 U.S. 717, 722 (1973). The Supreme Court has further noted that "once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly." Landon v. Plasencia, 459 U.S. 21, 32 (1982). Therefore, the basis for treating LPRs differently from non-LPRs under our immigration law is a belief that LPRs have stronger ties to the United States. *See, e.g.*, Taniguchi v. Schultz, 303 F.3d 950, 958 (9th Cir.2002) (asserting that "LPRs generally have stronger ties to the United States through both employment and family relationships" and rejecting an Equal Protection challenge to disparate treatment of LPRs and non-LPRs with respect to waivers under section 212(h)).

263 *See supra* Section III.C.1.b.

264 *See supra* note 247.

265 *See infra* Section III.G.

266 INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i). However, if the noncitizen is an LPR who was provided LPR status under INA § 245(j), 8 U.S.C. § 1255(j), then he or she is removable if he or she has been convicted within ten years (rather than five years) after the date of admission. Section 245(j) provides for the adjustment to LPR status of noncitizens admitted into the United States to provide the federal government with critical information on criminal or terrorist organizations.

267 Matter of Solon, 24 I. & N. Dec. 239, 240 (BIA 2007) (quoting Matter of Ajami, 22 I. & N. Dec. 949, 950 (BIA 1999)).

268 *See* Nina Bernstein, *When a Metrocard Led Far Out of Town*, N.Y. Times, Oct. 11, 2004, *available at* http://www.nytimes.com/2004/10/11/nyregion/11deport.html (reporting that a long-term LPR was detained and placed in removal proceedings based on his multiple convictions for turnstile jumping which were alleged to be crimes involving moral turpitude).

269 *See, e.g.*, Hyder v. Keisler, 506 F.3d 388, 392-93 (5th Cir. 2007) (discussing a split between the Fifth Circuit and Ninth Circuit over whether a conviction for misusing a Social Security number constitutes a crime involving moral turpitude).

270 Transactional Records Access Clearinghouse, Syracuse University, Individuals Charged with Moral Turpitude in Immigration Court (2008), *available at* http://trac.syr.edu/immigration/reports/moral_turp.html.

	FY1996	FY1997	FY1998	FY1999	FY2000	FY2001	FY2002	FY2003	FY2004	FY2005	FY2006
Number of Removal Proceedings	10,866	12,593	13,037	11,942	10,991	10,902	11,110	13,708	13,770	14,767	13,210

Thus, the number of removal proceedings in the immigration courts in which noncitizens were charged as being removable on the grounds of convictions for crimes involving moral turpitude grew approximately 21.6% from 10,866 in fiscal year 1996 to 13,210 in fiscal year 2006. This growth may, in part, be attributable to the expansion in the applicability of the deportation ground of a conviction of a crime involving moral turpitude effected by AEDPA, as described in Section III.D.1 below.

1. Expanded Scope of Removal on the Ground of a Conviction of a Crime Involving Moral Turpitude

Prior to the enactment of AEDPA in 1996, an LPR could be found deportable based upon a single conviction of a crime involving moral turpitude only if a sentence of at least a year *was actually imposed*.[271] AEDPA drastically expanded this deportation ground by requiring only that the offense have a *potential* sentence of one year or more.[272] As a result of this change, some minor crimes and misdemeanors fell within the definition of crimes involving moral turpitude, and noncitizens (including long-term LPRs) who had been convicted of such minor crimes — even before the enactment of AEDPA in 1996 — became subject to removal if removal proceedings were initiated against them after April 24, 1996 (i.e., AEDPA's enactment date).

For the following reasons, it is a misuse of the limited adjudicatory resources available for removal proceedings to bring removal proceedings against an LPR based on a conviction of a single minor offense, such as misdemeanor shoplifting, where no sentence was imposed:

- In some cases, the LPR will be eligible for a waiver of the minor offense, which will likely be granted after a hearing on the merits.
- In other cases, the LPR may be barred from applying for any discretionary relief for technical reasons, and he or she will engage in extended litigation to defend against removal.
- If an LPR is removed, his or her removal will be with all the attendant societal disruption described in Section III.C.1.b above.

2. 2008 Revision of the Categorical Approach to Determining Whether a Criminal Conviction is of a Crime Involving Moral Turpitude

Under the categorical approach,[273] an adjudicator determines whether a noncitizen's criminal conviction is for a crime involving moral turpitude for purposes of removal as follows:

- first, the adjudicator looks to the applicable criminal statute to determine whether the conduct necessary to violate this criminal statute is a crime involving moral turpitude; and
- second, if the statute is "divisible" (i.e., criminalizes different acts, some of which are crimes involving moral turpitude and others of which are not), then the adjudicator may inquire into the individual's record of conviction for the purpose of determining the applicable subpart of the statute under which such individual's conviction falls.

In short, the adjudicator's review under the categorical approach is limited to the applicable criminal statute and the individual's record of conviction, and inquiry into the particular acts of such individual is prohibited.[274]

---

271 *See* INA § 241(a)(2)(A)(i), 8 U.S.C. § 1251(a)(2)(A)(i) (1994) ("[A]n alien who is convicted of a crime involving moral turpitude . . . and either is sentenced to confinement or is confined therefor in a prison or correctional institution for one year or longer, is deportable.").

272 AEDPA § 435(a), 110 Stat. 1214 at 1274 (amending INA § 237(a)(2)(A)(i)(II), 8 U.S.C. § 1227(a)(2)(A)(i)(II)).

273 For purposes of this Report, references to "categorical approach" include the "modified categorical approach," which refers to the second part of the categorical approach in which a review of an individual's record of conviction is permitted.

274 *See, e.g.*, Jean-Louis v. Att'y Gen., 582 F.3d 462, 465-66 (3d Cir. 2009).

For almost 100 years,[275] courts and the BIA have employed the categorical approach to determine whether a prior conviction was of a crime involving moral turpitude.[276] This approach combines concerns for adjudicatory efficiency — by avoiding testimony of witnesses and other evidence to "re-try" the criminal case — and for fairness and predictability. Moreover, the categorical approach is consistent with the INA's statutory language, which provides that a noncitizen is inadmissible if he or she is "convicted" of a crime involving moral turpitude.[277]

In November 2008, in *In re Silva-Trevino*, former Attorney General Mukasey modified the traditional categorical approach by requiring an adjudicator to:

> (1) look first to the statute of conviction under the categorical inquiry set forth in this opinion and recently applied by the Supreme Court in *Duenas-Alvarez*; (2) if the categorical inquiry does not resolve the question, look to the alien's record of conviction, including documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript; and (3) if the record of conviction does not resolve the inquiry, consider any additional evidence the adjudicator determines is necessary or appropriate to resolve accurately the moral turpitude question.[278]

In short, *Silva-Trevino* instructs the immigration judge, under certain circumstances, to look beyond the record of conviction and review extrinsic evidence to make this determination.

Since November 2008, there have been reports of ICE trial attorneys submitting requests in removal proceedings for a hearing on the charge of conviction of a crime involving moral turpitude.[279] In addition, holding evidentiary hearings during removal proceedings regarding the facts underlying a noncitizen's criminal conviction in accordance with *Silva-Trevino* will add to the burdens of immigration courts and potentially cause delay in a significant number of immigration court proceedings.[280] *Silva-Trevino* has also created uncertainty as to the immigration consequences of criminal convictions,[281] which may result in increased unwillingness by defendants and their legal counsel to dispose of criminal cases by pleas and uncertainty and disruption in the criminal justice system.

---

275 *See*, e.g., United States ex rel. Mylius v. Uhl, 210 F. 860, 863 (2d Cir. 1914); United States ex rel. Castro v. Williams, 203 F. 155, 156-57 (S.D.N.Y. 1913).

276 *See, e.g.*, Gonzales v. Duenas-Alvares, 549 U.S. 183, 185-86 (2007); Jean-Louis v. Att'y Gen., 582 F.3d 462, 465-66 (3d Cir. 2009); Wala v. Mukasey, 511 F.3d 102, 107-108 (2d Cir. 2007); Vuksanovic v. United States AG, 439 F.3d 1308, 1311 (11th Cir. 2006); Recio-Prado v. Gonzales, 456 F.3d 819, 821 (8th Cir. 2006); Jaadan v. Gonzales, 211 Fed. Appx. 422, 426-27 (6th Cir. 2006); Cuevas-Gaspar v. Gonzales, 430 F.3d 1013, 1017-1020 (9th Cir. 2005); Bejarano-Urrutia v. Gonzales, 413 F.3d 444, 450 (4th Cir. 2005); Smalley v. Ashcroft, 354 F.3d 332, 336 (5th Cir. 2003); Maghsoudi v. INS, 181 F.3d 8, 14 (1st Cir. 1999); Matter of S–, 2 I&N Dec. 353, 357 (BIA 1945). Of all the circuit courts, only the Seventh Circuit has rejected the limits imposed by the categorical approach. *See* Ali v. Mukasey, 521 F.3d 737, 742-43 (7th Cir. 2008) (stating that "when deciding how to classify convictions under criteria that go beyond the criminal charge-such as . . . whether the crime is one of 'moral turpitude', the agency has the discretion to consider evidence beyond the charging papers and judgment of conviction").

277 When the U.S. Congress uses the term "convicted" in INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i), rather than "committed" or a similar word, then removability on the ground of a crime involving moral turpitude is premised not on an individual's actions or conduct but on whether he or she has been convicted of such a crime. *See In re* Velazquez-Herrera, 24 I. & N. Dec. 503, 513 (BIA 2008) ("For nearly a century, the Federal circuit courts of appeals have held that where a ground of deportability is premised on the existence of a 'conviction' for a particular type of crime, the focus of the immigration authorities must be on the crime of which the alien was convicted, to the exclusion of any other criminal or morally reprehensible acts he may have committed." (emphasis in original)).

278 *In re* Silva-Trevino, 24 I. & N. Dec. 687, 704 (AG 2008). Pursuant to the "realistic probability" test, immigration judges are instructed to determine whether there is a "realistic probability" — and not merely a "theoretical possibility" — that the statute would be applied to reach conduct that does not involve moral turpitude. *See* Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007) (adopting the "realistic probability" test in the context of an aggravated felony conviction).

279 *See* Daniel Shanfield, *The Immigration Judge, a Lawyer's Best Friend under Silva-Trevino?*, Immigration and Law Defense Blog (May 9, 2009), http://immigration-defense.typepad.com/daniel_shanfield_esq_immi/2009/05/the-immigration-judge-a-lawyers-best-friend-under-silvatrevino.html.

280 *See supra* Section III.D, which sets forth the number of removal proceedings in the immigration courts in which noncitizens were charged as being removable on the grounds of convictions for crimes involving moral turpitude in each of the fiscal years 1996 through 2006.

281 *See, e.g.*, Isaac Wheeler & Heidi Altman, Immigrant Def. Project & Neighborhood Defender Serv. of Harlem, Practice Advisory: Recent Developments in the Categorical Approach: Tips for Criminal Defense Lawyers Representing Immigrant Clients 4-5 (2009), *available at* http://www.immigrantdefenseproject.org/docs/09_Oct-9-advisory-date-(final_correctedl).pdf; Norton Tooby & Dan Kesselbrenner, *Living Under Silva-Trevino*, Immigration Daily (2009), http://www.ilw.com/articles/2009,0409-tooby.shtm.

E. Expanded Use of Expedited Removal Proceedings Has Deprived Many Noncitizens of Access to the Immigration Courts

Prior to April 1, 1997, if the admissibility of a noncitizen could not be verified by immigration officials, the person was entitled to a determination of his or her eligibility at a hearing before an immigration judge.[282] The noncitizen had the right to counsel, the right to examine witnesses at the hearing, and the right to appeal an adverse determination by the immigration judge.[283] With the enactment of IIRIRA in 1996, the INA was amended to authorize DHS immigration officials — *rather than immigration judges* — to order the removal of certain noncitizens apprehended at ports of entry using streamlined administrative procedures known as "expedited removal."[284] In addition, IIRIRA gave the Attorney General discretion to apply these procedures to any noncitizen who entered the United States without inspection and was present in the United States for less than two years.[285]

Under this authority, a CBP officer[286] may order the removal of a noncitizen who lacks proper documentation or has committed fraud or willful misrepresentation of facts to gain admission to the United States.[287] After obtaining concurrence from his or her supervisor,[288] the CBP officer shall issue an expedited removal order without any further hearing or review, unless the individual indicates either an intention to apply for asylum or a fear of persecution[289] or claims to be a U.S. citizen or to have been previously admitted as a LPR, refugee, or asylee.[290]

With limited exceptions, expedited removal orders are not subject to review by immigration judges, the BIA, or any federal court.[291] Collateral review is available in habeas corpus proceedings, but the review is limited to whether the petitioner is a noncitizen, was ordered expeditiously removed, or was previously granted LPR, refugee, or asylee status.[292]

Persons subject to expedited removal orders must be detained by DHS until removed and may only be released due to medical emergency or for law enforcement purposes.[293] Persons who have been expeditiously removed are banned from returning to the United States for five years.[294]

The concept of expedited removal was first proposed in 1986 legislation in response to the "Mariel boatlift" — the mass migration of nearly 200,000 Cubans and

---

282 8 U.S.C. §§ 1225(b), 1226(a) (1994).

283 8 U.S.C. §§ 1362 (right to counsel), 1229a(b)(4) (right to counsel and examine witnesses), and 1105a(b) (right to collateral review of exclusion order) (1994). 8 U.S.C. § 1226(b) and 8 C.F.R. § 3.1(b)(1) (right to appeal to the BIA) (1994).

284 IIRIRA § 302(a), 110 Stat. at 3009-579-84. INA § 235(b)(1), 8 U.S.C. § 1225(b)(1).

285 IIRIRA § 302(a), 110 Stat. at 3009-579-84. INA § 235(b)(1)(A)(iii), 8 U.S.C. § 1225(b)(1)(A)(iii).

286 CBP inspectors are responsible for enforcement of applicable law at ports of entry. United States Border Patrol agents, who are part of CBP, are charged with inspections *between* ports of entry and have no official authority at ports of entry. Blas Nuñez-Neto, Congressional Research Service, Report RL32562, Border Security: The Role of the U.S. Border Patrol CRS-1 (2008). For purposes of this Report, we use the terms "CBP officer," "CBP inspector," and "CBP agent" interchangeably to mean CBP inspectors at ports of entry and Border Patrol agents, as applicable.

287 The expedited removal provisions apply to noncitizens determined to be inadmissible under section 212(a)(6)(C), 8 U.S.C. § 1182(a)(6)(C) (fraud or willful misrepresentation), or section 212(a)(7), 8 U.S.C. § 1182(a)(7) (lack of proper documents). 8 C.F.R. § 235.5(b)(1). In addition, all noncitizens must satisfy CBP inspectors upon entry to the United States that they are not ineligible for admission under one of the other "grounds for inadmissibility" of INA § 212(a), 8 U.S.C. § 1182(a). These include health-related grounds, criminal history, national security and terrorist concerns, becoming a public charge, seeking to work without proper labor certification, illegal entry and immigration law violations, ineligibility for citizenship, and noncitizens previously removed. *See* Alison Siskin, Congressional Research Service, Report RL33109, Immigration Policy on Expedited Removal of Noncitizens, CRS-1, n. 2 (2006) [hereinafter CRS Immigration Policy on Expedited Removal of Noncitizens], *available at* http://assets.opencrs.com/rpts/RL33109_20060515.pdf. If an examining CBP officer determines that other "grounds of inadmissibility" under section 212(a) of the INA are applicable and wishes to remove the noncitizen on that basis, then an NTA will be issued, and the person must be detained. *See* INA § 235(b)(2), 8 U.S.C. 1225(b)(2); 8 C.F.R. 235.3(b)(3).

288 8 C.F.R. § 235.3(b)(2), (7).

289 INA § 235(b)(1)(A)(ii), 8 U.S.C. § 1225(b)(1)(A)(ii); 8 C.F.R. § 235.3(b)(4).

290 If an immigration officer is unable to verify an individual's claimed status as a U.S. citizen, LPR, refugee, or asylee, then the officer shall issue an expedited removal order and refer the individual to an immigration judge for review of such order. 8 C.F.R. § 235.3(b)(5)(i).

291 *See* INA §§ 235(b)(1)(A)(i), 235(b)(1)(B)(iii), 235(b)(1)(C), 235(b)(1)(D), 242(e); 8 U.S.C. §§ 1225(b)(1)(A)(i), 1225(b)(1)(B)(iii), 1225(b)(1)(C), 1225(b)(1)(D), 1252(e).

292 INA § 242(e)(2), 8 U.S.C. § 1252(e)(2).

293 8 C.F.R. § 235.5(b)(2)(iii). *See* Alison Siskin, Congressional Research Service, Report RL31606, Detention of Noncitizens in the United States CRS-7 (2002) (noting that most noncitizens subject to expedited removal face "continuous detention").

294 INA § 212(a)(9)(A)(i)-(ii), 8 U.S.C. § 1182(a)(9)(A)(i)-(ii).

Haitians to the United States over the course of just a few months — but was deleted from that legislation before enactment.[295] Seven years later, President Clinton revived the idea in the Expedited Exclusion and Alien Smuggling Enhanced Penalties Act of 1993, in order "to target [] perceived abuses of the asylum process by restricting the hearing, review, and appeal process for aliens at the port of entry," but that legislation failed to pass.[296] Next, in 1995, the House of Representatives passed a bill which included provisions providing for expedited removal, but those provisions were eliminated by the Senate.[297] Ultimately, Congress established expedited removal in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.[298]

In enacting expedited removal, Congress made clear its intent to increase efficiency and public safety by providing for the immediate deportation of "noncitizens who indisputably have no authorization to be admitted to the United States," while still ensuring that those individuals who may be persecuted in their home countries will receive a "prompt assessment" of their asylum claims.[299] Its proponents have maintained that it furthers these objectives. For example, DHS has claimed that expedited removal "enhance[s] national security and public safety by facilitating prompt immigration determinations, enabling DHS to deal more effectively with the large volume of persons seeking illegal entry, and [to] ensure removal from the country of those not granted relief, while at the same time protecting the rights of the individuals affected."[300]

1. Expanded Use of Expedited Removal

The following table demonstrates the increased reliance by DHS in recent years on streamlined, expedited removal proceedings, rather than removal proceedings in immigration court, to remove noncitizens:

As indicated in the table below:

FISCAL YEAR	NUMBER OF REMOVALS (1)	NUMBER OF EXPEDITED REMOVALS (2)	PERCENTAGE OF REMOVALS REPRESENTED BY EXPEDITED REMOVALS	NUMBER OF REMOVAL PROCEEDINGS RECEIVED BY IMMIGRATION COURTS (3)	RATIO OF NUMBER OF EXPEDITED REMOVALS TO NUMBER OF REMOVAL PROCEEDINGS RECEIVED BY IMMIGRATION COURTS
2004	240,665	51,014	21.2%	249,839	20.4%
2005	246,432	87,888	35.7%	325,027	27.0%
2006	280,974	110,663	39.4%	302,869	36.5%
2007	319,382	106,196	33.3%	272,848	38.9%
2008	358,886	113,462	31.6%	285,178	39.8%

(1) Total number of noncitizens removed from the United States based on orders of removal. OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2008, at 4 (2009), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_08.pdf.

(2) Total number of noncitizens removed from the United States based on expedited removal orders. *Id.*

(3) Total number of removal proceedings received by the immigration courts. EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2008 STATISTICAL YEAR BOOK C3 (2009), *available at* http://www.usdoj.gov/eoir/statspub/fy08syb.pdf.

295 CRS IMMIGRATION POLICY ON EXPEDITED REMOVAL OF ALIENS, *supra* note 287, at CRS-3.

296 *Id.*

297 *Id.* at CRS-4.

298 *Id.*

299 *See, e.g.*, H.R. REP. NO. 104-828, at 209 (1996); H.R. REP. NO. 104-469(I), at 12, 107, 118-25 (1996); United States v. Hernandez-Vermudez, 356 F.3d 1011, 1014 (9th Cir. 2004).

300 69 Fed. Reg. 48,877 (Aug. 11, 2004); *see also* MICHAEL JOHN GARCIA & RUTH ELLEN WASEM, CONGRESSIONAL RESEARCH SERVICE, REPORT RL32564, IMMIGRATION: TERRORIST GROUNDS FOR EXCLUSION AND REMOVAL OF ALIENS CRS-19 (2008) (explaining the use of expedited removal to remove noncitizens on security and related grounds, including terror-related activity). *But see* U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, *infra* note 332, at 4 (reporting failures by immigration officers to comply with, and lack of effective quality assurance measures to ensure consistent compliance with, expedited removal procedures intended to ensure protection of asylum seekers).

- the number of noncitizens removed from the United States under expedited removal orders increased by approximately 122.4% between fiscal year 2004 and fiscal year 2008;
- the percentage of total removals represented by expedited removals increased from approximately 21.2% in fiscal year 2004 to approximately 39.4% in fiscal year 2006 and then declined to approximately 31.6% in fiscal year 2008; and
- the ratio of expedited removals to the number of removal proceedings received by the immigration courts increased from approximately 20.4% in fiscal year 2004 to approximately 39.8% in fiscal year 2008.

2. Expedited Removal at Ports of Entry

There are two phases in the CBP inspection process at ports of entry: a primary inspection and a secondary inspection.[301] During primary inspection, a CBP officer inspects a noncitizen's identity and travel documents, such as passports, visas, or permanent residency cards.[302] Noncitizens are also questioned about their travel purposes and intentions in the United States, including the "applicant's intended length of stay and whether the applicant intends to remain permanently."[303] Generally, most persons quickly pass this stage and are allowed to enter the United States.[304]

If the CBP officer conducting the primary inspection believes that an individual is ineligible for admission, the officer will send that individual to a second CBP officer for "secondary" screening and inspection.[305] During the secondary inspection, which usually lasts about an hour, the CBP inspector may review any document the noncitizen is carrying, although a passenger that arrives by sea or air at a port of entry is not permitted to retrieve documents from checked luggage.[306] The noncitizen may not seek assistance from a lawyer or any friends or family.[307]

The secondary CBP inspector is required to create a sworn statement, using Forms I-867A and B, that summarizes the facts of the case and statements made by the noncitizen.[308] Form I-867A also sets forth a statement that the CBP inspector is required to read (or have read) to the noncitizen. The inspector is required to ask the noncitizen the questions contained on Form I-867B and record the noncitizen's responses there.[309] CBP officials are required to ask a series of questions to identify anyone who may be afraid to return to their country of origin.[310]

---

301 Michele R. Pistone & John J. Hoeffner, *Rules are Made to be Broken: How the Process of Expedited Removal Fails Asylum Seekers*, 20 GEO. IMMIGR. L.J. 167, 172 (2006).

302 *Id.*

303 *Id.* (quoting INA § 235(a)(5), 8 U.S.C. § 1225(a)(5)(2005)).

304 *Id.*

305 *Id.*

306 *Id.* at 173.

307 *Id.* Federal regulations that provide for the right to representation explicitly preclude this right in primary and secondary inspections, unless the applicant has become the focus of a criminal investigation and has been taken into custody. *See* 8 C.F.R. § 292.5(b).

308 8 C.F.R. § 1235.3(b)(2)(i).

309 *Id.*

310 U.S. Citizenship & Immigration Servs., Q: Under What Circumstances Do Asylum Officers Conduct Credible Fear Interviews?, http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=98ea0f953ff9c110VgnVCM1000004718190aRCRD&vgnextchannel=3a82ef4c766fd010VgnVCM1000000ecd190aRCRD (last modified Oct. 15, 2008).

Following the conclusion of this interview, the CBP inspector is required to confirm the accuracy of the record of the statements made during the interview on Form I-867B with the noncitizen, who is required to sign a statement attesting to the accuracy of the statements.[311] This confirmation is needed for those referred for a credible fear interview because the statements in Form I-867B may be introduced as evidence during subsequent proceedings.[312]

At the end of secondary inspection, the CBP officer may:

- allow the noncitizen to enter the country,
- deny admission and issue an expedited removal order,
- send the noncitizen to a credible fear interview if the person expresses an intent to apply for asylum or a fear of persecution or torture if returned to his or her country of origin,[313] or
- deny admission and issue an NTA to initiate removal proceedings.[314]

In limited cases, the CBP officer may allow the individual to withdraw his or her application for admission before the secondary inspector has denied admission and ordered removal.[315] In such case, he or she will still be removed, but will avoid a record of an order of expedited removal,[316] which would invoke a five-year ban on admission to the United States.

Noncitizens at ports of entry who are subject to expedited removal orders can be removed to the country from which they attempted to enter — often on the next available flight and in a matter of hours.[317] However, a noncitizen subject to an expedited removal order will generally be removed to a nation designated by him or her, but the federal government may disregard this designation under certain circumstances and remove such noncitizen to the country of which he or she is a subject, national, or citizen (unless this country's government is unwilling to accept such noncitizen or does not inform the federal government within some reasonable period of time whether it will accept such noncitizen).[318]

Determining the destination country and effecting this removal, however, can be difficult. The length of time it may take to effect such removal order may be significant. As of 2005, noncitizens apprehended within the United States and subject to an expedited removal order were detained for an average of 32 days prior to their removal.[319]

3. Expedited Removal within the Interior of the United States

Initially, DOJ announced in 1997 that expedited removal proceedings would be applied only to "arriving aliens" at ports of entry because applying these procedures to noncitizens already present in the United States would involve more complex

311 8 C.F.R. § 1235.3(b)(2)(i).

312 *See supra* Section II.C.1.a.

313 Pistone & Hoeffner, *supra* note 301, at 173-74.

314 If an examining CBP officer determines that "grounds of inadmissibility" under INA § 212(a), 8 U.S.C. § 1182(a), other than fraud, willful misrepresentation or lack of proper documents, are applicable and wishes to remove the noncitizen on that basis, then the noncitizen shall be detained and an NTA shall be issued. *See* INA § 235(b)(2), 8 U.S.C. 1225(b)(2); 8 C.F.R. 235.3(b)(3).

315 *See* 8 C.F.R. § 235.4.

316 Pistone & Hoeffner, *supra* note 301, at 173 n.27.

317 If an expedited removal order is issued at an air or sea port of entry, the airline or sea carrier is required to take the inadmissible person back on board or have another aircraft or vessel operated by the same company return the noncitizen to the country of departure. CRS Immigration Policy on Expedited Removal of Aliens, *supra* note 287, at CRS-6 (citing INA § 241(c), (d)).

318 INA § 241(b)(2), 8 U.S.C. § 1231(b)(2). A noncitizen may only designate a foreign territory contiguous to the United States, or an island adjacent to such a foreign territory of the United States, if he or she is a native, citizen, subject, or national of, or has resided in, that designated territory or island. INA § 241(b)(2)(B), 8 U.S.C. § 1231(b)(2)(B).

319 Blas Nuñez-Neto, et al., Congressional Research Service, Report RL33097, Border Security: Apprehensions of "Other Than Mexican" Aliens CRS-8 (2005).

determinations of fact and would be more difficult to manage.[320] However, pursuant to a public notice dated November 13, 2002,[321] a public notice dated August 11, 2004,[322] and certain press releases,[323] DHS expanded the application of expedited removal proceedings to: (1) noncitizens who arrived by sea and are not admitted or paroled;[324] and (2) noncitizens who are present in the United States without being admitted or paroled, are apprehended within 100 air miles of the U.S. border, and have not established to the satisfaction of a DHS immigration officer that they have been physically present in the United States continuously for the 14-day period immediately preceding the date of apprehension.

The regulations for expedited removal proceedings at ports of entry also apply to such proceedings for noncitizens apprehended within the United States,[325] although there are a few differences. When a CBP officer apprehends an individual within the interior of the United States, the officer will interview the person to determine whether he or she has a legal right to be in the country.[326] The individual has the burden of demonstrating to the satisfaction of the CBP agent that he or she has been in the United States continuously for 14 days or longer prior to the date of apprehension. If the noncitizen cannot meet this burden, he or she may be subject to an expedited removal order.[327]

4. Problems in the Implementation of Expedited Removal

The current expedited removal scheme arose from an attempt by Congress to address a swelling caseload in the immigration courts by committing solely to the discretion of DHS officers removal adjudications for "noncitizens who indisputably have no authorization to be admitted to the United States."[328] However, whether a noncitizen has "no authorization to be admitted" and whether that fact is "indisputable" are central questions in removal adjudications. Congress has effectively allowed DHS to determine not only whether certain noncitizens will be removed but also who will make that decision and whether it can be reviewed.

It is difficult to gauge the fairness of any particular expedited removal proceeding because persons in secondary inspection are not permitted to seek assistance from an attorney or friends or family,[329] and a removal order issued by an inspecting officer generally is not subject to judicial review. However, a number of studies of expedited removal describe significant problems. For example, in 2005, the United States Commission on International Religious Freedom ("USCIRF")[330] concluded:

> [W]hen procedures are followed, appropriate referrals [for Credible Fear interviews] are

320 62 Fed. Reg. 10312, 10313-14 (Mar. 6, 1997) (codified as amended at 8 C.F.R. § 235.3(b)).

321 In November 2002, INS expanded the application of expedited removal proceedings to noncitizens arriving by sea who were neither admitted nor paroled. 67 Fed. Reg. 68,924 (Nov. 13, 2002).

322 69 Fed. Reg. 48,877, 48,880 (Aug. 11, 2004). This expansion applied only to apprehensions made within CBP Border Patrol sectors Laredo, McAllen, Del Rio, Marfa, El Paso, Tucson, Yuma, El Centro, San Diego, Blaine, Spokane, Havre, Grand Forks, Detroit, Buffalo, Swanton, and Houlton.

323 Press Release, U.S. Dep't of Homeland Sec., Department of Homeland Security Streamlines Removal Process Along Entire U.S. Border (Jan. 30, 2006), *available at* http://www.dhs.gov/xnews/releases/press_release_0845.shtm; Press Release, U.S. Dep't of Homeland Sec., DHS Expands Expedited Removal Authority Along Southwest Border (Sept. 14, 2005), *available at* http://www.dhs.gov/xnews/releases/press_release_0750.shtm (last modified Sept. 14, 2005).

324 In this context, "parole" means the temporary permission granted to a noncitizen to enter and be present in the United States. Parole does not constitute formal admission into the United States, and parolees are required to leave when the parole expires, or if eligible, to be admitted in a lawful status. CRS Immigration Policy on Expedited Removal of Aliens, *supra* note 287, at CRS-2 n.11 (citing 67 Fed. Reg. 68923 (Nov. 13, 2002)).

325 69 Fed. Reg. 48,877, 48,880 (Aug. 11, 2004).

326 Blas Nuñez-Neto, et al., *supra* note 319, at CRS-8.

327 69 Fed. Reg. at 48,880.

328 *See, e.g.*, H.R. Rep. No. 104-828, at 215 (1996); H.R.Rep. No. 104-469(I), at 12, 107, 118-25 (1996).

329 *See* Pistone & Hoeffner, *supra* note 301, at 173.

330 USCIRF is a bipartisan, government entity created by the International Religious Freedom Act of 1998 to monitor the status of freedom of thought, conscience, and religion or belief abroad, as defined in the Universal Declaration of Human Rights and related international instruments, and to give independent policy recommendations to the President, the Secretary of State, and the Congress. U.S. Comm'n on Int'l Religious Freedom, Frequently Asked Questions, http://www.uscirf.gov/index.php?option=com_content&task=view&id=337&Itemid=1 (last visited Dec. 24, 2009).

more likely to be made. However, there was frequent failure on the part of CBP officers to provide required information to noncitizens during the Secondary Inspection interview and occasional failures to refer eligible noncitizens for Credible Fear interviews when they expressed a fear of returning to their home countries. In addition, researchers noted a number of inconsistencies between their observations and the official records prepared by the investigating officers (A-files). Finally, on a handful of occasions, researchers observed overt attempts by CBP officers to coerce noncitizens to retract their fear claim and withdraw their applications for admission.[331]

In a number of instances when immigration inspectors failed to refer persons who expressed a fear of return to their country of origin to a secondary inspector, the inspector indicated on a sworn statement that the applicant had claimed no fear of return.[332] USCIRF also reported cases in which CBP officers told noncitizens about the negative consequences of pursuing asylum claims in the United States.[333]

In addition, the United Nations High Commissioner for Refugees in 2003 conducted a confidential study of conduct by immigration inspectors and found that many had negative views of asylum seekers, intimidated them and treated them with derision, routinely handcuffed and restrained them, failed to provide them interpreters, improperly notified consular officials from the country of origin of the asylum-seeker's presence, concluded that persons expressing a credible fear of persecution were not entitled to asylum, and encouraged asylum seekers not to pursue their claims.[334]

These problems may stem from the fact that CBP officers are required to pursue two goals that are, in some respects, contradictory: (1) ensuring that inadmissible noncitizens are not permitted to enter the United States; and (2) ensuring that noncitizens fleeing persecution, including torture, are offered the opportunity to seek protection in accordance with U.S. laws and treaty obligations although such noncitizens would otherwise be inadmissible. The problems are also exacerbated by possibly conflicting guidelines[335] and the limited review of expedited removal orders, which are subject only to a supervisor's approval.[336]

The USCIRF study raises concerns about the effectiveness of the supervisory review. In particular, supervisors have been observed on occasion accepting incomplete sworn statements to mandatory inspection questions, failing to review the inspection officer's removal order, allowing unauthorized officers

331 Allen Keller et al., *Evaluation of Credible Fear Referral in Expedited Removal at Ports of Entry in the United States* 3, *in* U.S. Comm'n on Int'l Religious Freedom, Report on Asylum Seekers in Expedited Removal, Volume II: Expert Reports (2005). This study found, among other things, that: (1) in roughly half of all cases observed, officers did not read the obligatory paragraph informing noncitizens that U.S. law provides protection to certain persons who face persecution, harm or torture upon return to their home country; (2) in approximately 5% of the cases observed, CBP officers did not specifically inquire about fear of returning to their respective countries; (3) one in six noncitizens who expressed a fear of return during secondary inspection were placed in expedited removal or allowed to withdraw their application for admission; and (4) in ten cases (representing approximately 2.3% of all cases observed), noncitizens expressed fear during interviews with the researchers but did not mention any fear to the interviewing officer when asked, and all these individuals declined when asked if they wanted to alert the CBP officer of their fear. *Id.* at 20, 28-29.

332 U.S. Comm'n on Int'l Religious Freedom, Report on Asylum Seekers in Expedited Removal, Volume I: Findings & Recommendations 5-6 (2005).

333 These cases were not included in the reported numbers of deliberate coercive actions by CBP officers, but these actions discourage noncitizens from making valid claims. For example, two noncitizens were told by CBP officers that, because they entered illegally, they might not have a chance to present their cases, and five were told they would be held in detention for three weeks or more. Three of the five were told that detention would last at least one month. Keller et al., *supra* note 331, at 24.

334 Andrew I. Schoenholtz, *Refugee Protection in the United States Post-September 11*, 36 Col. Hum. Rts. L. Rev. 323, 333 (2005) (reporting findings from United Nations High Comm'r for Refugees, Study of the U.S. Expedited Removal Process: Report to the U.S. Department of Homeland Security (2003) (unreleased)).

335 *See* 8 C.F.R. § 235.3(b)(4) (providing that any noncitizen who expresses a fear must be referred for a credible fear interview). *But see* Keller et al., *supra* note 331, at 29 (reporting that "the Inspectors' Field Manual instructs that the case should not be referred if "the noncitizen asserts a fear or concern which is clearly unrelated to an intention to seek asylum or a fear of persecution").

336 8 C.F.R. § 235.4(b)(7).

to conduct the supervisory review, relying on inadequate telephonic review of records, and confusing the standard to be applied when applicants express fear in their secondary inspection interviews.[337] Similarly, USCIRF found that noncitizens' sworn statements were often inaccurate and usually unverifiable due to inadequate quality control procedures for secondary inspection that rely on immigration inspectors' "self reporting."[338]

F. Issues Relating to Adjustments to Lawful Permanent Resident Status

Generally, a noncitizen is eligible for lawful permanent resident status if he or she: (1) is a family member of a U.S. citizen or LPR;[339] or (2) has certain job skills and is the beneficiary of an approved employment-based visa petition filed for his or her benefit.[340]

A noncitizen in removal proceedings, who is otherwise eligible to become an LPR pursuant to section 203, may be ineligible to adjust to LPR status pursuant to section 245(a) if he or she:

- was not admitted and inspected by an immigration officer;
- engaged in unauthorized employment in the United States at any time (with some exceptions, including when the noncitizen is an immediate relative of a U.S. citizen); or
- is or has been "out of status" at any time since his or her admission into the United States (except when the noncitizen is an immediate relative of a U.S. citizen).[341]

In light of these restrictions, many noncitizens in removal proceedings are likely not eligible to adjust to LPR status pursuant to section 245(a). Section 245(i) sets forth an alternative means of adjusting to LPR status when noncitizens are ineligible under section 245(a), but very few currently meet the eligibility conditions of section 245(i).[342] In addition, USCIS has taken the position that if the three-year, ten-year, or permanent bar to admission is applicable, then a noncitizen is not eligible to adjust his or her status pursuant to section 245(i). (*See* Section III.F.1 below.)

If a noncitizen present in the United States is not eligible to adjust status pursuant to section 245(a) or 245(i), then he or she must "consular process" an immigrant visa application to attain legal immigration status in the United States. Consular processing requires, among other things, that the noncitizen leave the United States (usually returning to the country of nationality or last residence) and attend an immigrant visa appointment at a U.S. consulate abroad.[343] Consular processing, however, is discouraged by the bars to re-entry discussed below.

---

337 *See* Pistone & Hoeffner, *supra* note 301, at 184-93 (discussing each supervisory failure).

338 UNITED STATES COMM'N ON INT'L RELIGIOUS FREEDOM, ASYLUM SEEKERS IN EXPEDITED REMOVAL, PART I, at 74 (2005) [hereinafter EXPEDITED REMOVAL PART I].

339 There are five categories of noncitizens who qualify for LPR status based on family relationships: (1) an immediate relative of a U.S. citizen (i.e., a spouse, unmarried minor child, or parent of a U.S. citizen who is at least 21 years of age, and certain widows and widowers); (2) a citizen's unmarried child who is 21 years of age or older; (3) spouses and unmarried children of LPRs; (4) married children of U.S. citizens; and (5) siblings of U.S. citizens who are at least 21 years of age. INA §§ 201(b)(2)(A)(i), 203(a), 8 U.S.C. §§ 1151(b)(2)(A)(i), 1153(a).

340 INA § 203(b), 8 U.S.C. § 1153(b) (employment-based immigrant visas). A noncitizen may otherwise be qualified for immigrant status under specialized provisions of the INA, such as the diversity visa lottery. INA § 203(c), 8 U.S.C. § 1153(c). In addition, refugees and asylees physically present in the United States for at least one year are eligible for adjustment to LPR status. 8 C.F.R. § 209.1-.2.

341 INA § 245(a), 8 U.S.C. § 1255.

342 A noncitizen is eligible to adjust to LPR status pursuant to section 245(i) of the INA, 8 U.S.C. § 1255(i), if he or she pays a penalty fee of $1,000 and meets one of the following conditions:

- is the beneficiary of an immigrant visa petition filed with the Immigration and Naturalization Service (INS) on or before January 13, 1988;
- is the beneficiary of an immigrant visa petition filed with INS after January 14, 1998 but on or before April 30, 2001, and was in the United States on December 21, 2000;
- is the beneficiary of a labor certification filed with the Department of Labor on or before January 13, 1988; or
- is the beneficiary of a labor certification filed with the Department of Labor after January 14, 2008 but on or before April 30, 2001, and was in the United States on December 21, 2000.

In addition, such noncitizen's spouse and children are eligible to adjust to LPR status under section 245(i) of the INA, 8 U.S.C. § 1255(i), as derivative beneficiaries.

343 22 C.F.R. §§ 42.61(a), 42.62.

1. Bars on Admission

IIRIRA added (effective as of April 1, 1997) a three-year bar, a ten-year bar, and a permanent bar on admission to the United States for noncitizens with certain immigration status violations:

- *Three-Year Bar*. If a noncitizen: (1) was unlawfully present[344] in the United States for longer than 180 days but less than one year (beginning on or after April 1, 1997) during any single stay in the United States; and (2) voluntarily departed prior to the commencement of removal proceedings, then he or she is inadmissible for three years after the date of his or her departure.[345]
- *Ten-Year Bar*. If a noncitizen was unlawfully present for at least one year (beginning on or after April 1, 1997) during any single stay in the United States, then he or she is inadmissible for ten years after his or her departure.[346]
- *Permanent Bar*. If a noncitizen: (1) was unlawfully present for more than one year in the aggregate (beginning on or after April 1, 1997), whether accrued during any single stay or multiple stays in the United States, or was ordered excluded, removed or deported (whether before, on or after April 1, 1997); and (2) subsequently enters or attempts to enter the United States without being lawfully admitted, he or she is permanently barred from admission to the United States.[347]

If a noncitizen is not able to adjust status pursuant to section 245(a) or 245(i) and the three- or ten-year bar on admission is applicable, then in order to legalize his or her status, this noncitizen must leave the United States and consular process his or her immigrant visa petition and either: (1) apply for a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) by filing a Form I-601 Application for Waiver of Grounds of Inadmissibility at the U.S. Consulate considering his or her immigrant visa petition;[348] or (2) wait abroad for the three or ten years to run. If the waiver is not granted by DHS, then this noncitizen remains subject to the three- or ten-year bar, even if he or she obtains an immigrant visa from a U.S. Consulate before the expiration of such three- or ten-year period. Although no waiver to inadmissibility under the permanent bar is available to noncitizens (other than VAWA self-

---

344 For purposes of all three bars, a noncitizen is "unlawfully present" in the United States if he or she: (1) is present in the United States after the expiration of a period of stay authorized by DHS; or (2) is present in the United States without being admitted or paroled. INA § 212(a)(9)(B)(ii), 8 U.S.C. § 1182(a)(9)(B)(ii). For policy reasons, USCIS has determined that even if a noncitizen is actually present in the United States with certain unlawful immigration status, he or she does not accrue unlawful presence for purposes of these bars on admission in some circumstances; for example, during the pendency of a properly filed adjustment of status application, even if the noncitizen does not have legal status in the United States during such time. Memorandum from Donald Neufeld, Acting Assoc. Dir., Domestic Operations Directorate, U.S. Citizenship & Immigration Servs., et al., Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act 9, 11 (May 6, 2009), *available at* http://www.uscis.gov/files/nativedocuments/revision_redesign_AFM.PDF.

345 INA § 212(a)(9)(B)(i)(I), 8 U.S.C. § 1182(a)(9)(B)(i)(I).

346 INA § 212(a)(9)(B)(i)(II), 8 U.S.C. § 1182(a)(9)(B)(i)(II).

347 INA § 212(a)(9)(C), 8 U.S.C. § 1182(a)(9)(C). However, if such a noncitizen has remained outside of the United States for at least ten years, then he or she may apply for consent from DHS to reapply for admission pursuant to section 212(a)(9)(C)(ii) of the INA, 8 U.S.C. § 1182(a)(9)(C)(ii), and 8 C.F.R. § 212.2. In addition, waivers from such permanent bar are available to certain noncitizens; for example, pursuant to INA § 212(a)(9)(C)(iii), 8 U.S.C. § 1182(a)(9)(C)(iii), an approved VAWA self-petitioner is eligible for a waiver if there is a connection between the abuse suffered by this person and her removal, departure from the United States, and subsequent re-entry (or attempted re-entry).

References to "permanent bar" in this Section III.F.1 and in Section IV.C.1, *infra*, do not include the permanent bar from reentry into the United States to which noncitizens removed on the ground of aggravated felony convictions are subject. *Compare* INA § 212(a)(9)(C)(iii), 8 U.S.C. § 1182(a)(9)(C)(iii), *with* 212(a)(9)(A)(i), 8 U.S.C. § 1182(a)(9)(A)(i).

348 A noncitizen who is married to, or the child of, a U.S. citizen or an LPR is eligible for a discretionary waiver from the three-/ten-year bar if he or she can establish that his or her being barred from admission into the United States would result in an "extreme hardship" to his or her U.S. citizen or LPR spouse or parent. *See* INA § 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v). When a consular officer determines that a noncitizen is admissible but for the three-/ten-year bar, then the consular officer informs the noncitizen of the application procedures and will forward the filed Form I-601 Application for Waiver of Grounds of Inadmissibility and related fee to USCIS for adjudication. *See* 22 C.F.R. § 40.92(c); 8 C.F.R. § 212.7(a)(1). If extreme hardship to a qualifying relative is established, then the USCIS officer adjudicating the application will consider whether, as a matter of discretion, the application should be approved or denied. *See* U.S. Citizenship & Immigration Servs., Immigrant Waivers: Procedures for Adjudication of Form I-601 For Overseas Adjudication Officers 51-52 (2009), *available at* http://www.uscis.gov/files/article/i601_immigrant_waivers_8jun09.pdf. Denials of waiver applications may be appealed to USCIS's Administrative Appeals Office, which will review the decision de novo and consider any additional information submitted. *Id*. at 55, 58.

petitioners), noncitizens subject to the permanent bar may apply for consent to reapply for admission.[349] Thus, although some relief is possible, these bars on admission discourage noncitizens from consular processing their immigrant visa petition and encourage undocumented noncitizens *who may otherwise be eligible to legalize their status* to remain in the United States as undocumented noncitizens.

The combined effects of the restrictions are: (1) to support year-to-year growth in the number of undocumented noncitizens in the United States, which is a significant pool of noncitizens subject to removal;[350] (2) to limit the availability during removal proceedings of a form of relief for which a significant number of noncitizens would otherwise be eligible; and (3) to deprive ICE trial attorneys of the ability to resolve removal cases for a significant number of noncitizens through plea bargaining.

2. Service of Notices to Appear on Persons Eligible for Lawful Permanent Resident Status

On July 11, 2006, Michael L. Aytes, Associate Director for Domestic Operations of USCIS, issued a memorandum informing USCIS offices that on and after October 1, 2006, upon the completion of the denial of an application or petition, an NTA should "normally" be prepared as part of the denial if the applicant is removable and there are no means of relief available.[351] The memorandum notes that "[d]eciding whether a person is removable and whether an NTA should be issued is an integral part of the adjudication of an application or petition."[352] This represents a shift in prior USCIS policy established in September 2003 under which the issuance of NTAs by USCIS Service Centers was focused on:

- cases in which a noncitizen's violation of the INA or other law constituted a threat to public safety or national security;
- instances where fraud schemes had been detected; and
- certain applications for temporary protected status where the basis for the denial or withdrawal constituted a ground of deportability or excludability.[353]

While this policy shift did not eliminate the exercise of prosecutorial discretion,[354] practitioners have reported instances in which USCIS has served NTAs on noncitizens who are out of status but eligible to adjust to LPR status pursuant to section 245. For example, in January and February 2009, the Texas Service Center reportedly issued NTAs to out-of-status noncitizen beneficiaries following the approval of employment-based immigrant visa petitions (Form I-140) filed for their benefit.[355] The new policy also can reach noncitizens eligible to adjust to LPR status pursuant to section 245(i) who have not yet filed to adjust their status or who were unable to adjust their status because of backlogs associated with the relevant employment-based immigrant visa preference category.

In March 2009, USCIS said it was not changing its 2001 policy not to use the filing of an immigrant petition, application for labor certification, or application to adjust

---

349 If the permanent bar on admission is applicable, a noncitizen may apply for consent from DHS to reapply for admission to the United States pursuant to section 212(a)(9)(C)(ii) of the INA, 8 U.S.C. § 1182(a)(9)(C)(ii), and 8 C.F.R. § 212.2, but he or she must have remained outside of the United States for at least ten years prior to making this application.

350 There are many factors that may affect the growth or decline in the population of undocumented noncitizens in the United States, including the global and U.S. economic climates, U.S. immigration enforcement policy, and the perceived likelihood that U.S. immigration policy will be liberalized. *See, e.g.*, CTR. FOR IMMIGRATION STUDIES, HOMEWARD BOUND: RECENT IMMIGRATION ENFORCEMENT AND THE DECLINE IN THE ILLEGAL NONCITIZEN POPULATION 4-8 (2008).

351 USCIS Policy Memorandum No. 110, supra note 96, at 7.

352 *Id*. at 1.

353 Memorandum from William R. Yates, *supra* note 98.

354 For example, USCIS has noted that it maintained and had the authority to exercise prosecutorial discretion and that "[t]here will be a number of cases where USCIS will decide not to issue an NTA upon a finding that to do so would be against the public interest or contrary to humanitarian concerns." U.S. Citizenship & Immigration Servs., Response to Recommendation #22 (Apr. 27, 2006) http://www.dhs.gov/xlibrary/assets/CISOmbudsman_RR_22_Notice_to_Appear_USCIS_Response-04-27-06.pdf. In addition, USCIS has said there may be situations in which it would be logistically inappropriate to issue an NTA, such as where an application to adjust to LPR status was denied because it was filed prior to the effective date of the preference category priority. *Id.*

355 AILA InfoNet, Doc. No. 09031266 (posted Mar. 12, 2009).

status as the sole ground to initiate removal proceedings against an eligible out-of-status applicant.[356] USCIS noted, however, that its Service Centers have discretion to issue NTAs when a beneficiary is not maintaining status and would not rescind NTAs served on these beneficiaries of approved employment-based immigration visa (Form I-140) petitions.[357]

There are at least three problems associated with USCIS serving NTAs on noncitizens eligible to adjust to LPR status. First, it contributes to the overburdening of the removal adjudication system. Second, the immigration judge presiding over the noncitizen's removal proceeding might not adjourn the case to a date when the applicable immigrant visa is available.[358] The failure to obtain a continuance could result in a removal order being issued against a noncitizen who was eligible for relief from removal, except for a matter of timing. Third, using the adjudication of any benefit application to identify and initiate removal proceedings against noncitizens generally discourages noncitizens from applying for immigration benefits to which they are entitled.

G. Increased Use of Detention Raises Both Efficiency and Fairness Issues

The INA provides DHS with broad authority to detain noncitizens while awaiting a determination of whether they should be removed from the United States and *requires* that certain categories of noncitizens, including those subject to expedited removal and those who are in removal proceedings on the ground of alleged aggravated felony convictions, *must* be detained by DHS. No bond is available to noncitizens who must be detained.[359]

The legal framework governing detention determinations differs depending on whether the noncitizen is seeking admission to the United States, has been placed in removal proceedings, or is subject to a removal order. For each of these circumstances, the Director of ICE's Office of Detention and Removal ("DRO") exercises substantial discretion to decide the following four issues:

- whether a noncitizen will be detained, unless such noncitizen is subject to mandatory detention under our immigration laws;
- where the person will be detained;
- whether a noncitizen, having been detained, will be paroled; and
- whether a noncitizen will be enrolled in one of ICE's alternatives to detention programs.

However, the exercise of DRO's discretionary authority to detain a noncitizen not subject to mandatory detention is guided by detention priorities based on factors such as danger to the community and national security concerns.[360]

Noncitizens have the legal right to challenge their detention. Custody and bond determinations can be reviewed by an immigration judge at any time before the removal order becomes final, except in certain cases.[361] The noncitizen may appeal the

---

356 AILA Infonet Doc. No. 09032460 (posted March 24, 2009). *See also* Memorandum from Michael A. Pearson, Executive Assoc. Comm'r, Office of Field Operations, U.S. Citizenship & Immigration Servs., to Regional Dirs., Guidance on Initiation of Removal Proceedings and Section 245(i) of the Immigration and Nationality Act 2 (Apr. 27, 2001) (noting that the exercise of prosecutorial discretion embodied in the 2001 policy would "ensure that individuals eligible for the benefits of section 245(i) of the INA, and relatives or employers eligible to file immigrant petitions or labor certifications on their behalf, will not be deterred from initiating the process to legalize their status through fear that their filing will be used to identify and remove them.").

357 *See* AILA Infonet Doc. No. 09032460 (posted March 24, 2009).

358 Immigration judges may grant motions for continuances for good cause shown, but "good cause" is not defined in the regulations. 8 C.F.R. § 1003.29; *see also* 8 C.F.R. § 1240.6. There is a presumption that an immigration judge should favorably exercise his or her discretion where a prima facie approvable visa petition and adjustment application have been submitted in the course of removal proceedings, but immigration judges are not required to grant continuances in every case where there is a pending visa petition. *In re* Hashmi, 24 I. & N. Dec. 785, 790 (BIA 2009).

359 Alison Siskin, Congressional Research Service, Report RL32369, Immigration-Related Detention: Current Legislative Issues 1 (2004), *available at* http://www.fas.org/irp/crs/RL32369.pdf.

360 *See* Memorandum from Asa Hutchinson, Under Sec'y for Border & Transp. Sec., U.S. Dep't of Homeland Sec., to Robert C. Boner, Comm'r, U.S. Customs & Border Prot. & Michael J. Garcia, Assistant Sec'y, U.S. Immigration & Customs Enforcement, Detention Prioritization and Notice to Appear Documentary Requirements 2-3 (Oct. 18, 2004), *available at* http://www.ice.gov/doclib/foia/dro_policy_memos/detentionprioritizationandnoticetoappeardocumentaryrequirements.pdf.

361 Siskin, *supra* note 359, at CRS-12. The following custody determinations are *not* subject to re-determination by an immigration judge: (1) noncitizens in exclusion proceedings; (2) arriving noncitizens; (3) noncitizens deportable as security threats; (4) criminal noncitizens; and (5) noncitizens in pre-IIRIRA deportation proceedings who have been convicted of aggravated felonies. *Id.* at CRS-12, n.60.

immigration judge's decision to the Board of Immigration Appeals.[362]

Following the enactment of IIRIRA in 1996, which mandated the detention of certain noncitizens (including those convicted of aggravated felonies), Congress significantly increased the amount of funding appropriated to DHS (and INS prior to 2003) for detention purposes.[363] DHS has used that funding to increase the number of detention beds, and the number of people detained by DHS has grown significantly.[364]

As discussed in detail below, the increasing use of detention by DHS and DHS's current detention policies and practices raise a number of concerns and problems:

- The rapid growth in the number of detainees has led DHS to house them in facilities over which DHS lacks control or supervision and, in some cases, under inhumane conditions, and ICE is not able to track on a real-time basis the location of all detainees;
- The mandatory detention provisions of the INA force DHS to detain many noncitizens who do not pose flight risks or threats to national security, public safety, or other persons, and may result in a decreased ability to detain noncitizens who are not subject to mandatory detention but do pose such risks;
- Even where detention is not mandatory, DHS detains noncitizens in situations where detention is not necessary; and
- Detainees are often housed far from friends and family and have difficulty obtaining effective legal representation; in addition, detention impairs the ability of noncitizens subject to removal proceedings to defend themselves, particularly if they are detained in locations far from key witnesses and evidence.[365]

1. Rapid Growth in Use of Detention

The number of persons detained annually by DHS has grown rapidly since the enactment of IIRIRA in 1996 and DRO's announcement in 2003 that its goal was 100% removal of all "removable aliens" by 2012.[366] The average daily population of detained noncitizens

362 *Id.* at CRS-12.

363 Appropriations for detention and removal in fiscal year 1996 were approximately $488.0 million, as compared to approximately $2.55 billion in fiscal year 2010. David Dixon & Julia Gelatt, Migration Policy Inst., Immigration Facts: Immigration Enforcement Spending Since IRCA 7 (2005); Fact Sheet, U.S. Immigration & Customs Enforcement, ICE Fiscal Year 2010 Enacted Budget 2 (Nov. 5, 2009), *available at* http://www.ice.gov/pi/news/factsheets/index_office.htm.

364 The number of funded detention beds increased 69.9% from 19,655 in fiscal year 2001 to 33,400 in fiscal year 2009. U.S. Dep't of Justice, FY 2002 Budget Summary: Immigration and Naturalization Service – Breached Bond/Detention Fund, *available at* http://www.justice.gov/archive/jmd/2002summary/html/ins_breached_bond.htm; Fact Sheet, U.S. Immigration & Customs Enforcement, Fiscal Year 2009, at 3 (Oct. 23, 2008), *available at* http://www.ice.gov/pi/news/factsheets/index_office.htm. Average daily detention bed space usage in fiscal year 2000 was 18,518, as compared to an average daily population of detainees over 30,000 in fiscal year 2009. U.S. Dep't of Justice, *supra*; *Alien Detention Standards: Observations on the Adherence to ICE's Medical Standards in Detention Facilities: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security and International Law, H. Comm. on the Judiciary*, 110th Cong. 1 (2008) (statement of Richard M. Stana, Dir., Homeland Sec. & Justice Issues, U.S. Gov't Accountability Office), *available at* http://www.gao.gov/new.items/d08869t.pdf.

365 We note that many of these problems are acknowledged in Dr. Dora Schriro's report "Immigration Detention Overview and Recommendations" released in October 2009. Dora Schriro, Dir., Office of Detention Policy & Planning, U.S. Immigration & Customs Enforcement, Immigration Detention Overview and Recommendations (2009), *available at* http://www.ice.gov/doclib/091005_ice_detention_report-final.pdf. In response to these acknowledged problems, ICE announced comprehensive reforms to the immigration detention system in August and October 2009. *See* Press Release, U.S. Immigration & Customs Enforcement, Secretary Napolitano and ICE Assistant Secretary Morton Announce New Immigration Detention Reform Initiatives (Oct. 6, 2009) [hereinafter Press Release, Immigration Detention Reform Initiatives], *available at* http://www.ice.gov/pi/nr/0910/091006washington.htm; Press Release, U.S. Immigration & Customs Enforcement, ICE Announces Major Reforms to Immigration Detention System (Aug. 6, 2009) [hereinafter Press Release, Reforms to Immigration Detention System], *available at* http://www.ice.gov/pi/nr/0908/090806washington.htm. However, the implementation and details of these reforms, and their effectiveness in dealing with the acknowledged problems in the immigration detention system, remain to be seen.

366 *See* Office of Detention & Removal, U.S. Dep't of Homeland Sec., Endgame: Office of Detention and Removal Strategic Plan, 2003 – 2012, at 2-1 (2003), *available at* http://www.thenyic.org/images/uploads/ICE_Endgame_Strategic_Plan.pdf ("The basic Mission . . . remains the same: Remove all removable aliens."). Note that this document is no longer publicly available from DHS sources.

increased from 9,011 in fiscal year 1996[367] to 31,345 in fiscal year 2008.[368] The number of noncitizens detained over the course of a year increased from approximately 209,000 in fiscal year 2001[369] to 378,582 in fiscal year 2008.[370] It is estimated that by the end of fiscal year 2009, DHS will have detained approximately 380,000 noncitizens.[371] As a result of this rapid growth in ICE's detainee population, ICE currently operates the largest detention and supervised release program in the United States.[372]

Meanwhile, the average length of stay for detainees declined from 36.9 days in fiscal year 2007 to 30.49 days in fiscal year 2008.[373] These averages were calculated on the basis of the time in ICE custody for all detainees released during the applicable fiscal year and reflects the high volume of short-term detainees.[374] According to ICE, 25% of its detained population is released within one day of admission, 38% within one week, 71% in less than one month, and 95% within four months, and less than one percent of all detainees is kept for one year or more.[375]

As the population of detained noncitizens and turnover have increased, the burden and challenges of housing and managing an extremely diverse population[376] in accordance with humane standards and applicable laws have also grown. To meet the financial burden of housing this growing population of detained noncitizens, the annual budget for DRO's custody operations has increased significantly. The annual budget for DRO's custody operations in fiscal year 2005 was approximately $0.86 billion,[377] as compared to an annual budget of approximately $1.77 billion in fiscal year 2010.[378]

In light of the rapid growth in the detainee population, ICE has increasingly relied upon private contractors and local facilities to house its detainee population,[379] and this has reduced ICE's ability to supervise and impose its own controls upon the conditions of detention.[380] For example, ICE houses approximately 50% of its detainee population in approximately 240 non-dedicated or shared-use county jails operating under intergovernmental service agreements, and a majority of these intergovernmental service agreements do not require compliance with ICE's national detention standards.[381] Thus, recent problems in the conditions and management of the immigration detention system[382] are, in part, a direct consequence of DHS's aggressive enforcement and

---

367 Siskin, *supra* note 359, at CRS-12.

368 Fact Sheet, U.S. Immigration & Customs Enforcement, Detention Management (Nov. 20, 2008), *available at* http://www.ice.gov/pi/news/factsheets/detention_mgmt.htm (last modified Dec. 10, 2008) (includes individuals detained in ICE, Office of Refugee Resettlement, and Bureau of Prison facilities).

369 U.S. Immigration & Naturalization Serv., 2001 Statistical Yearbook of the Immigration and Naturalization Service 235 (2003), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2001/yearbook2001.pdf.

370 DHS 2008 Enforcement Actions, *supra* note 65, at 3.

371 *See* Schriro, *supra* note 365, at 6.

372 *Id.* at 2.

373 Fact Sheet, U.S. Immigration & Customs Enforcement, *supra* note 368.

374 *See* Donald Kerwin & Serena Yi-Ying Lin, Migration Policy Inst., Immigration Detention: Can ICE Meet Its Legal Imperatives and Case Management Responsibilities 19 (2009), *available at* http://www.migrationpolicy.org/pubs/detentionreportSept1009.pdf.

375 Schriro, *supra* note 365, at 6.

376 *See id*. at 5-6.

377 U.S. Immigration & Customs Enforcement, Budget Fact Sheet – Fiscal Year 2005 (Feb. 5, 2006), *available at* http://www.ice.gov/doclib/pi/news/factsheets/2005budgetfactsheet.pdf.

378 U.S. Immigration & Customs Enforcement, Budget Fact Sheet – Fiscal Year 2010 (Nov. 5, 2009), *available at* http://www.ice.gov/pi/news/factsheets/index.htm.

379 Only 13% of detainees are held in ICE-owned facilities, which are operated by private contractors. All others are held in local or state facilities pursuant to intergovernmental agency service agreements, facilities owned by private contractors, or other facilities (such as Bureau of Prison facilities). Fact Sheet, U.S. Immigration & Customs Enforcement, *supra* note 368; *see also* Schriro, *supra* note 365, at 10.

380 *See generally* Office of Inspector Gen., U.S. Dep't of Homeland Sec., ICE Policies Related to Detainee Deaths and the Oversight of Immigration Detention Facilities (2008), *available at* http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_08-52_Jun08.pdf.

381 Schriro, *supra* note 365, at 9.

382 *See, e.g., In-Custody Deaths*, N.Y. Times, *available at* http://topics.nytimes.com/top/reference/timestopics/subjects/i/immigration_detention_us/incustody_deaths/index.html (last visited Dec. 24, 2009) (collecting articles published by the Times about immigrant detainee deaths and failure to provide medical care from 2005 to 2009).

detention policies that cannot fully be supported by current detention facilities and procedures.

In response to current detention conditions and problems, ICE announced in August 2009 and October 2009 a number of reforms to the immigration detention system intended to improve custodial conditions and medical care of detainees (including special populations such as women, families, and detainees who have medical issues or are mentally ill), fiscal prudence, and ICE's oversight of the immigration detention system.[383] More specifically, these reforms are intended to create a "truly civil detention system"[384] and include the following measures, among others:

- *Planning a civil detention system to meet ICE's needs*. ICE established an Office of Detention Policy and Planning staffed with experts to plan and design a civil detention system tailored to ICE's needs.
- *Ensuring detained noncitizens are housed in appropriate facilities.* ICE will devise and develop a risk assessment and custody classification to enable ICE to determine placement of detainees to appropriate facilities. In addition, ICE has begun market research in using converted hotels, nursing homes, and other residential facilities as immigration detention facilities for non-criminal, non-violent detainees.
- *Improving oversight over detention facilities*. ICE hopes to improve its oversight over local jails, state prisons and private facilities by: (1) hiring and training ICE detention managers to staff on site at 23 facilities, which collectively house more than 40% of detainees; (2) enabling routine and random inspections of detention facilities to be conducted more frequently by ICE employees independent of the DRO; (3) standardizing the provisions of the intergovernmental service agreements pursuant to which noncitizens are detained in state and local jails; (4) centralizing oversight over such agreements; and (5) aggressively monitoring and enforcing performance in compliance with such agreements, including pursuing remedies for poor performance such as termination.
- *Reviewing and improving ICE's detention standards*. By the end of fiscal year 2010, ICE intends to review and revise its detention standards to reflect the conditions appropriate for various immigration detainee populations.
- *Enabling legal representatives, friends, and others to locate detainees online.* ICE is accelerating efforts to provide an online locator system for attorneys, family members, and others to locate detainees.
- *Advancing the more effective use of ICE's alternatives to detention program*. As described in Section III.G.3 below, ICE intends to expand use of its alternatives to detention programs.[385]

2. Mandatory Detention

The mandatory detention provisions of the INA require the detention of large numbers of people, including individuals convicted of certain criminal offenses, national security risks, arriving asylum seekers who lack proper documentation until they can demonstrate a credible fear of persecution, persons subject to expedited removal, arriving noncitizens who appear inadmissible, and persons under final orders of removal for a limited period of time.[386] These provisions have led DHS to arrest and detain petty offenders who pose neither threats to national security, public safety, or other persons nor flight risks, such as owners of successful small businesses or those with minor children who are U.S. citizens, and have contributed significantly to the rapid growth in the number of detainees in ICE's custody since 1996. In addition, DHS's Office of Inspector General noted in 2006 that they precluded DHS from making practical decisions about the best use of limited detention space and could even limit DHS's ability in the future to

383 *See* Fact Sheet, U.S. Dep't of Homeland Sec., ICE Detention Reform: Principles and Next Steps: Secretary Napolitano Announces New Immigration Detention Reform Initiatives (Oct. 6, 2009) [hereinafter Fact Sheet, Ice Detention Reform], *available at* http://www.ice.gov/doclib/10-06-09-fact_sheet_ice_detention_reform.pdf; *see also* Press Release, Immigration Detention Reform Initiatives, *supra* note 365; Press Release, Reforms to Immigration Detention System, *supra* note 365.

384 *See* Nina Bernstein, *U.S. to Reform Policy on Detention for Immigrants*, N.Y. TIMES, Aug. 5, 2009, *available at* http://www.nytimes.com/2009/08/06/us/politics/06detain.html?pagewanted=1.

385 Fact Sheet, U.S. Dep't of Homeland Sec., *supra* note 383.

386 SISKIN, *supra* note 359, at CRS-7.

detain noncitizens who were not subject to mandatory detention but posed potential national security or public safety risks.[387]

The mandatory detention provisions also force individuals with valid asylum claims who enter the country without valid entry documents — who have already suffered persecution and detention in their home countries — to suffer again through immediate and sometimes prolonged detention here.

Commentators have argued that DHS interprets the mandatory detention provisions as broadly as possible to require detention of noncitizens whose detention might be disputable as a matter of law. For example, although the mandatory detention provisions of section 236(c) only apply to noncitizens released from custody after the effective date of the statute (i.e., October 9, 1998), and the district courts have consistently interpreted these provisions to mean that the "release from custody" must be from a criminal sentence based on the removable offense,[388] ICE has interpreted these provisions to mean that the release from *any custody* — even if unrelated to the removable offense — after October 9, 1998 triggers mandatory detention and has detained noncitizens released from custody for the removable offense well before October 9, 1998.[389]

3. Alternatives to Detention

Detention is not the only means by which a noncitizen's appearance during removal proceedings can be ensured. Some nonprofit organizations have operated alternatives to detention programs that succeeded in ensuring the attendance of noncitizens at immigration proceedings.[390] For example, the Vera Institute of Justice's Appearance Assistance Program ("AAP"), which operated from February 1997 to March 2000, achieved excellent results in this regard. The AAP required participants to report regularly in person and by telephone and provided to participants information about consequences of failures to comply with U.S. immigration laws, reminders of immigration court dates, and referrals to legal and other services.[391] The Vera Institute of Justice reported that 127 "criminal aliens," who would have been subject to mandatory detention had they been apprehended after October 8, 1998, participated in the AAP, and that this particular group had a 94% appearance rate in immigration court hearings.[392]

The use of alternatives to detention *alone* may not, however, be as effective in ensuring compliance with removal orders as in ensuring attendance at hearings prior to the issuance of a final removal order. Although the Vera Institute of Justice reported that 69% of AAP intensive participants[393] complied with their final orders, most of this compliance was due to people being allowed to stay in the United States. The findings with respect to AAP participants ordered to leave the United States were not conclusive because most of them, at the time of the Vera Institute of Justice's study, were still appealing their cases or had not yet been issued notices to surrender.[394] The Vera Institute of Justice also reported that about half of the AAP participants granted voluntary departure did not depart, which was equivalent to similar noncitizens on bond.[395]

---

387 *See* Office of Inspector Gen., U.S. Dep't of Homeland Sec., Detention and Removal of Illegal Aliens 5-6 (2006), *available at* http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_06-33_Apr06.pdf.

388 *See* Garcia v. Shanahan, 615 F.Supp.2d 175, 180 (S.D.N.Y. 2009) ("Like every district court that has considered the question at bar, this Court now concludes that the petitioner is not subject to mandatory detention under Section 1226(c), because he was released from prison for the removable offense well prior to the effective date of the mandatory detention rule.").

389 *Id*. at 180-183 & n.2 (describing a number of successful challenges in the federal courts to ICE's application of mandatory detention provisions under these circumstances).

390 *See, e.g.*, Human Rights First, In Liberty's Shadow: U.S. Detention of Asylum Seekers in the Era of Homeland Security 42 (2004).

391 Eileen Sullivan, et al., Vera Inst. of Justice, Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program, Volume 1, at i (2000), *available at* http://www.vera.org/download?file=615/finalreport.pdf.

392 Oren Root, Nat'l Dir., Appearance Assistance Program, Vera Inst. of Justice, The Appearance Assistance Program: An Alternative to Detention For Noncitizens In U.S. Immigration Removal Proceedings (May 1, 2000), *available at* http://www.vera.org/download?file=209/aap_speech.pdf.

393 The Vera Institute of Justice designed, implemented, and evaluated the AAP. The AAP provided supervision at two levels: intensive and regular. Intensive AAP participants were required to report regularly to supervision officers in person or by telephone, and AAP staff monitored the intensive participants' whereabouts. Regular AAP participants, however, were not required to report regularly to AAP staff. Sullivan, et al., *supra* note 391, at 1-2.

394 *Id*. at 5-6.

395 *Id.* at 6.

Accordingly, the Vera Institute of Justice noted that caution should be exercised in using an alternative to detention program to enforce removal orders and suggested that intense supervision under an alternative to detention program, combined with detention, could be used for noncitizens required to depart the United States.[396] For example, a noncitizen could be detained when ordered removed and then if such noncitizen appeals his case, and depending on the results of a flight risk assessment,[397] released to supervision under an appropriate alternative to detention program, subject to re-detention for violations of the program's rules.[398]

The DRO currently operates three programs that are "alternatives to detention" for detainees whose detention is not required under the mandatory detention provisions:[399]

- *Intensive Supervision Appearance Program ("ISAP").* ISAP, which began in 2004, is provided by a third party contractor to ICE and is the most restrictive of the alternatives to detention programs. ISAP closely supervises participating noncitizens with electronic monitoring via radio frequency, global positioning systems, and telephone reporting requirements, in addition to unannounced home visits, curfew checks, and employment verification. ISAP can accommodate 6,000 participants daily and is available to noncitizens who live within a 50 to 85 mile radius of an ICE field office.
- *Enhanced Supervision/Reporting ("ESR") program.* ESR, which started in December 2007, is similar to ISAP, except that the supervision is not as extensive. ESR can accommodate 7,000 noncitizens per day and is available to noncitizens who live within a 50 to 85 mile radius of an ICE field office.
- *Electronic Monitoring ("EM") program.* EM, which also began in December 2007, is operated by ICE and is the least restrictive alternative to detention program. EM is available to noncitizens residing in locations in which ISAP and ESR are not available, and they are subject to both electronic monitoring using radio frequency, telephone, or global positioning systems technologies. EM has a capacity to serve 5,000 participants daily.

Although ICE noted that it does not collect the necessary data to assess the effectiveness of its alternatives to detention programs,[400] based on the data available, ICE reported the following results for its alternatives to detention programs:[401]

ALTERNATIVE TO DETENTION PROGRAM	APPEARANCE RATE (1)	PERCENTAGE RATE ABSCONDED (2)
ISAP	87%	9.5%
ESR	96%	1.5%
EM	93%	5.0%

(1) The percentage of program participants who appeared for their removal proceedings.

(2) The percentage of program participants who absconded from the program and were not apprehended by ICE.

396 *Id*. at 9.

397 The Vera Institute of Justice observed that several factors increased the likelihood of compliance with hearing requirements, including having community and family ties in the United States and being represented by counsel. *Id*. at 7.

398 *Id*. at 6, 9.

399 *See* Fact Sheet, U.S. Immigration & Customs Enforcement, Alternatives to Detention for ICE Detainees (Oct. 23, 2009), *available at* http://www.ice.gov/pi/news/factsheets/alternativestodetention.htm (last modified Oct. 23, 2009); *see also* SCHRIRO, *supra* note 365, at 20.

400 *See* KERWIN & LIN, *supra* note 374, at 31 (citing letter dated July 2, 2009 from Dr. Schriro to Donald Kerwin).

401 *See* Fact Sheet, U.S. Immigration & Customs Enforcement, *supra* note 399.

In addition to being effective in ensuring appearances at removal proceedings, the costs of ICE's alternatives to detention programs are less than the costs of detention. Although ICE has acknowledged that it does not collect "complete and accurate information" to assess the cost of its alternatives to detention programs, ICE estimates that these programs cost much less than "hard" detention.[402]

ICE's alternatives to detention programs are not intended for noncitizens required by statute to be detained.[403] However, in light of the restrictions imposed on participants' liberty by electronic monitoring devices used in ICE's alternatives to detention program, these programs may be better characterized as less restrictive forms of civil custody or "alternative *forms* of detention."[404] Moreover, because ICE's alternatives to detention programs are currently made available only to noncitizens for whom detention is not mandatory and who have demonstrated that they are neither flight risks nor dangers to the community,[405] noncitizens who actually may be eligible for release — or at the very least, for parole or bond — are enrolled in ICE's alternative to detention programs.[406] This has led some observers to criticize the application of overly restrictive conditions of supervision on participants in ICE's alternatives to detention[407] and to assert that ICE appears to use its alternatives to detention programs as "alternatives to release."[408]

If DHS were to determine that ICE's current alternatives to detention programs constituted custody for purposes of the INA, it could extend these programs to mandatory detainees who do not pose a danger to the community or a national security risk and for whom the risk of flight, within the parameters of the programs, is minimal, and this could result in significant savings to the federal government.[409]

In August 2009 and October 2009, ICE announced comprehensive reforms to the immigration detention system, including its alternatives to detention programs.[410] Among these reforms, ICE is reportedly:

- Developing and implementing a more refined risk assessment classification tool to ensure all eligible candidates are placed in ICE's alternatives to detention programs and the appropriate level of supervision is administered;

---

402 Kerwin & Lin, *supra* note 374, at 31 (citing letter dated July 2, 2009 from Dr. Schriro to Donald Kerwin). ICE estimated that the direct program costs, not including ICE staff time, for ISAP, ESR, and EM are $14.42 per day, $8.52 per day, and between 30 cents and $5 per day, respectively. *Id.* at 32 (citing letter dated July 2, 2009 from Dr. Schriro to Donald Kerwin). This compares favorably to an average cost of "hard detention" of $141 per person per day calculated by Associated Press reporter Michelle Roberts. Michelle Roberts, *AP Impact: Immigrants Face Detention, Few Rights*, Associated Press, Mar. 16, 2009, *available at* http://abcnews.go.com/US/wireStory?id=7087875.

403 *See* Fact Sheet, U.S. Immigration & Customs Enforcement, *supra* note 399.

404 *See, e.g.*, Kerwin & Lin, *supra* note 374, at 31; Am. Immigration Lawyers Ass'n, Position Paper: Alternatives to Detention (2008), *available at* http://www.aila.org/Content/default.aspx?docid=25874; *Crossing the Border: Immigrants in Detention and Victims of Trafficking: Hearing Before the Dep't of Homeland Security Subcomm. on Border, Maritime and Global Counterterrorism* 110th Cong. 7 (2007) (testimony of Michelle Brané, Dir., Detention and Asylum Program, Women's Comm'n for Refugee Women and Children), *available at* http://homeland.house.gov/SiteDocuments/20070315162728-15975.pdf ("Some government-initiated programs labeled as 'alternatives to detention' may in fact be 'alternative forms of detention.'"); Catholic Legal Immigration Network, Inc., The Needless Detention of Immigrants in the United States: Why Are We Locking Up Asylum Seekers, Children, Stateless Persons, Long-Term Permanent Residents, and Petty Offenders 2, 30 (2000), *available at* http://www.cliniclegal.org/sites/default/files/atrisk4.pdf ("[T]he law's 'mandatory detention' provisions could be satisfied through home detention and other alternative forms of custody."); *see also In re* X– (Immigration Ct. (Orlando, Fla.) Mar. 6, 2009) (bond proceeding), *available at* http://drop.io/BondVictoryOrlando06Mar2009 (finding that ISAP constitutes custody within the meaning of INA § 236); *In re* X– (Immigration Ct. (Los Angeles, Cal.) May 18, 2008) (custody proceeding), *available at* http://www.bibdaily.com/pdfs/Bass%20IJ%205-18-08%20electronic%20bracelet%20bond%20decision.pdf (finding that ESR constitutes custody within the meaning of INA § 236 and 8 C.F.R. 1236.1(d)).

405 *See* Am. Immigration Lawyers Ass'n, *supra* note 404.

406 *See id.*; Catholic Legal Immigration Network, *supra* note 404.

407 *See* Schriro, *supra* note 365, at 20; Amnesty Int'l, Jailed Without Justice: Immigration Detention in the USA 28 (2009); Am. Immigration Lawyers Ass'n, *supra* note 404.

408 *See* Human Rights First, *supra* note 211, at 66. Human Rights First reports that ICE has, in some cases, briefly detained asylum seekers who have applied for asylum affirmatively — essentially for the purpose of placing them into its alternatives to detention programs. *Id*. at 66-67.

409 *See* Kerwin & Lin, *supra* note 374, at 31-32; Doris Meissner & Donald Kerwin, Migration Policy Inst., DHS and Immigration: Taking Stock and Correcting Course 55 (2009) [hereinafter Correcting Course].

410 *See* Press Release, Immigration Detention Reform Initiatives, *supra* note 365; Press Release, Reforms to Immigration Detention System, *supra* note 365.

- Developing a plan to be submitted to the U.S. Congress in the fall of 2009 to implement an alternative to detention program nationwide; and
- Updating training and policies and procedures for ICE's alternatives to detention programs.[411]

4. DHS Parole and Bond Policies

Noncitizens who are not subject to mandatory detention may be detained, paroled, or released on bond or their own recognizance.[412]

a. Parole

Arriving individuals who appear to the inspecting officer to be inadmissible[413] and detainees in expedited removal proceedings who establish a credible fear of persecution or torture may be paroled, on a case-by-case basis, for "'urgent humanitarian reasons' or 'significant public benefit,' provided the noncitizen presents neither a security risk nor a risk of absconding."[414] There are five categories of noncitizens who may meet the parole standards: (1) those with serious medical conditions making detention inappropriate; (2) pregnant women; (3) juveniles; (4) witnesses in judicial, legislative, or administrative proceedings in the United States; and (5) noncitizens for whom continued detention is not in the public interest.[415] A grant of parole may be made by a wide range of ICE officials at various levels of the immigration system,[416] is an exercise of discretion by the Secretary of DHS, and is not reviewable by the courts.[417]

In a change in ICE's prior parole guidelines, ICE issued a directive on November 6, 2007 providing that parole should be granted in only "limited circumstances,"[418] rather than to those "who meet the credible fear standard, can establish identity and community ties, and are not subject to any possible bars to asylum involving violence or misconduct."[419] The November 2007 directive states that ICE policy is to remove all noncitizens with final orders of removal, that continued custody of noncitizens who pose a flight risk is the most effective way of ensuring their appearance, and that consideration of parole shall proceed in a two-step process. The first step is a "threshold assessment of whether the alien's parole request and any supporting documents establish: (1) the alien's identity; (2) that he or she does not pose a risk of flight; and (3) that he or she is not a danger to the community." The second step is an assessment of whether the noncitizen has established that he or she meets one of the five categorical parole standards set forth in 8 C.F.R. § 212.5(b).[420]

Since the November 2007 directive, DHS appeared to have taken a "hard" line against granting parole.[421] The more limited availability of parole under the November 2007 directive has increased the demands on the detention system and made removal adjudications less fair and efficient because detention often impairs the ability of asylum applicants to defend themselves from removal.

On December 16, 2009, ICE issued a revised parole policy to be effective January 4, 2010. Pursuant to the revised parole policy, all noncitizens who arrive at a

411 *See* Fact Sheet, U.S. Immigration & Customs Enforcement, *supra* note 399; Fact Sheet, Ice Detention Reform, *supra* note 383.

412 SISKIN, *supra* note 359, at CRS-1.

413 8 C.F.R. § 235.3(c).

414 *Id.* §§ 212.5(b), 235.3(b), 235.3(c).

415 *Id.* § 212.5(b).

416 The authority to grant parole may be exercised by "the Assistant Commissioner, Office of Field Operations; Director, Detention and Removal; directors of field operations; port directors; special agents in charge; deputy special agents in charge; associate special agents in charge; assistant special agents in charge; resident agents in charge; field office directors; deputy field office directors; chief patrol agents; district directors for services; and those other officials as may be designated in writing." *Id.* § 212.5(a).

417 INA § 236(e), 8 U.S.C. § 1226(e). Pursuant to HSA §§ 102(a), 441, 1512(d), and 1517; 116 Stat. at 2142-43, 2192, 2310, and 2311; 6 U.S.C. §§ 112, 251, 552(d), and 557; and 8 C.F.R. § 2.1, the Attorney General's authority under INA § 236(e), 8 U.S.C. § 1226(e), was transferred to the DHS Secretary, and references to the Attorney General in the statute are deemed to refer to the DHS Secretary.

418 U.S. Immigration & Customs Enforcement, Parole of Arriving Aliens Found to Have a "Credible Fear" of Persecution or Torture 2 (Nov. 6, 2007).

419 Memorandum from Michael A. Pearson, Executive Assoc. Comm'r for Field Operations, Office of Field Operations, U.S. Immigration & Naturalization Serv., to Regional Dirs., District Dirs. & Asylum Office Dirs., Expedited Removal: Additional Policy Guidance 4 (Dec. 30, 1997).

420 U.S. Immigration & Customs Enforcement, Parole of Arriving Aliens Found to Have a "Credible Fear" of Persecution or Torture 3-4, 5-8 (Nov. 6, 2007).

421 *See, e.g.*, Interview with Nancy Morawetz, Professor of Clinical Law, New York University School of Law.

port of entry and are found by a USCIS asylum officer or an immigration judge to have a credible fear of persecution or torture will automatically be considered for parole. In addition, this revised parole policy explains that the "public interest is served by paroling arriving aliens found to have a credible fear who establish their identities, pose neither a flight risk nor a danger to the community, and for whom no additional factors weigh against their release."[422] It remains to be seen whether ICE will effectively implement this revised parole policy.

b. Release on Bond

As long as a detained noncitizen is not subject to mandatory detention due to criminal or terrorist activity specified in the INA, he or she may be released on bond (of a minimum of $1,500) or on his or her own recognizance.[423] ICE officers have discretion, when making an initial bond determination, to determine whether a detainee will be released, and if so, upon what conditions.

In order to be released on bond, a noncitizen "must demonstrate to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding."[424] Subject to certain exceptions, after the bond determination by ICE, the noncitizen may apply for bond redetermination by an immigration judge at any time until a removal order becomes final.[425]

The BIA has ruled that a bond applicant must demonstrate that it is "substantially unlikely" that DHS can establish that he is subject to mandatory detention.[426] If an immigration judge determines that a bond applicant is not properly subject to mandatory detention but does not reach the merits of the removal decision, DHS can nonetheless continue to detain the person pending appeal of that ruling.[427]

5. Location and Transfers of Detainees

ICE has full discretion to choose the place of a noncitizen's detention. ICE also exercises complete discretion to transfer detainees within the immigration detention system at any point. Since fiscal year 1999, the proportion of detainees who have been transferred by ICE has increased significantly. In fiscal year 1999, 19.6% of detainees were transferred from one detention facility to another, compared to 52.4% during the first six months of fiscal year 2008.[428] In addition, in fiscal year 1999, 5.6% of detainees were subject to multiple transfers, compared to 24% during the first six months of fiscal year 2008.[429] Most transferred detainees are sent from facilities in the eastern, western, and northern

---

422 Fact Sheet, U.S. Immigration & Customs Enforcement, Revised Parole Policy for Arriving Aliens with Credible Fear Claims (Dec. 16, 2009), http://www.ice.gov/pi/news/factsheets/credible-fear.htm (last modified Dec. 17, 2009).

423 INA § 236(a)(2)(A), 8 U.S.C. § 1226(a)(2)(A).

424 8 C.F.R. §§ 236.1(c)(8), 1236.1(c)(8).

425 An immigration judge is prohibited from reviewing ICE's bond determinations for the following people:

- those considered to be "arriving aliens" under 8 C.F.R. § 1.1(q);
- those "described in" the terrorism and security related ground of deportability, INA § 237(a)(4), 8 U.S.C. § 1227(a)(4);
- those subject to mandatory detention under INA § 236(c)(1), 8 U.S.C. § 1226(c)(1);
- those in exclusion proceedings; and
- those with final administrative orders of removal under INA § 242(a)(2), 8 U.S.C. § 1252(a)(2).

8 C.F.R. §§ 236.1(c)(11), 1003.19(h)(2), and 1236.1(c)(11). Even though an immigration judge does not have jurisdiction to re-determine bond for these groups, the judge does have jurisdiction to review whether ICE correctly classified the noncitizen in one of the groups. 8 C.F.R. § 1003.19(h)(2)(ii).

426 *In re* Joseph, 22 I. & N. Dec. 3398, at 3 (BIA 1999).

427 *Id.* at 8, 12.

428 Transactional Records Access Clearinghouse, Syracuse University, Huge Increase in Transfers of ICE Detainees (2009), *available at* http://trac.syr.edu/immigration/reports/220/.

429 *Id.*

regions of the United States to facilities located in the southern and southwestern United States.[430]

DHS is generally required by federal regulations to determine within 48 hours of a noncitizen's arrest whether to detain a noncitizen or release him or her on bond or recognizance and whether to issue an NTA.[431] However, ICE is not required to file an NTA with an immigration court within a specified time after it has been served and frequently does not file an NTA with an immigration court until the noncitizen has been moved to the detention facility in which he or she is expected to remain during the pendency of his or her removal proceedings.[432] If the noncitizen is moved to a facility outside of his or her state of residence and ICE files the NTA with the local immigration court where the detention facility is located, then this local court has jurisdiction over the removal proceeding.[433] This is problematic for at least four reasons:

- First, approximately 70% of detainees are housed in local or state facilities,[434] which are typically located in rural areas where it is more difficult for detainees, particularly indigent detainees who depend on pro bono attorneys, to obtain legal representation.
- Second, if a noncitizen is represented by a lawyer, the lawyer may be located in the client's state of residence and not necessarily where the noncitizen has been transferred. Such physical separation makes it difficult, if not impossible, to hold in-person meetings between the noncitizen and his or her legal counsel.[435] Even arranging telephone conversations can be difficult for detained noncitizens.[436]
- Third, if a noncitizen is detained in a location in which the controlling law of the applicable circuit court is different from that in his or her original residence, he or she may be seriously disadvantaged in removal proceedings, particularly if he or she had previously received and acted in accordance with legal advice based on the controlling law of the circuit court of his or her original residence.[437] Although a noncitizen may attempt to change venue back to an immigration court in his or her state of residence, immigration judges rarely grant such requests opposed by ICE trial attorneys.[438]
- Fourth, noncitizens have been transferred to locations far from their states of residence and thus away from key witnesses and evidence, which

430 *See* Office of Inspector Gen., U.S. Dep't of Homeland Security, Immigration and Customs Enforcement Policies and Procedures Related to Detainee Transfers 1 (2009), *available at* http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_10-13_Nov09.pdf.

431 *See* 8 C.F.R. § 287.3(d).

432 *See* Office of Inspector Gen., *supra* note 430, at 2. If the NTA is filed at the local immigration court located near the initial detention facility, then the ICE trial attorney typically will file a motion to change the venue to the new, post-transfer jurisdiction. *See* Human Rights Watch, Locked Up Far Away: The Transfer of Immigrants to Remote Detention Centers in the United States 63 (2009), *available at* http://www.hrw.org/sites/default/files/reports/us1209web.pdf.

433 *See* 8 C.F.R. § 1003.14(a) ("Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service."). Either party to a removal proceeding may move to change the venue to another immigration court, and an immigration judge may change the venue of such a proceeding for good cause. 8 C.F.R. § 1003.20(b).

434 *See* Schriro, *supra* note 365, at 10, 15 (reporting that 25% of the ICE detainee population is housed in "ICE-only IGSA" (i.e., seven dedicated county jail facilities with which ICE maintains intergovernmental agency service agreements ("IGSA") and 45% of such population is housed in "shared IGSA" (i.e., non-dedicated or shared-use county jails through IGSA)).

435 For a discussion of legal representation issues, see *infra* Part 5.

436 Detainees generally cannot receive incoming telephone calls, but staff members in the facilities are required to take messages and provide them to detainees. Detention facilities are required to make available public pay telephones to all the detainees during certain hours, and they may use these telephones to place collect or calling card calls. *See* U.S. Immigration & Customs Enforcement, ICE/DRO Detention Standard: Telephone Access in Operations Manual ICE Performance-Based National Detention Standards 7, 4, 2 (Dec. 2, 2008), *available at* http://www.ice.gov/doclib/PBNDS/pdf/telephone_access.pdf.

437 For example, in the Ninth Circuit, a person sentenced for a drug offense under a first offender treatment program is not considered convicted for immigration purposes and therefore is not deportable pursuant to section 237(a)(2)(B)(i). Lujan-Armendariz v. INS, 222 F.3d 728 (9th Cir. 2000). Outside the Ninth Circuit, however, such a sentence is considered to be a conviction for immigration purposes making the applicable noncitizen deportable under section 237(a)(2)(B)(i) of the INA. *See In re* Roldan, 22 I. & N. Dec. 3377 (BIA 1999). Therefore, an LPR living in the State of California may plead guilty to a drug possession charge in exchange for enrollment in a first offender treatment program while correctly believing that this plea will not make him deportable *in the State of California*. But, if DHS files an NTA in an immigration court outside the Ninth Circuit, this LPR may be deportable. For other examples of how transfers to other jurisdictions result in the application of materially different interpretations of U.S. immigration law to removal proceedings, see Human Rights Watch, *supra* note 432, at 72-78.

438 *See* Human Rights Watch, *supra* note 432, at 63-64.

seriously impairs their ability to defend themselves from removal.[439]

In addition, for a number of reasons, it is often quite difficult for legal counsel, family, and friends of any detainee to determine with certainty where such detainee is located. First, ICE has complete discretion with respect to the initial placement of detainees and subsequent transfers. Second, ICE has a limited ability to locate detainees once they have been placed in detention, in large part because of failures to update the detention tracking system in a timely and accurate manner.[440] Third, ICE staff routinely fail to provide notices required by ICE's National Detention Standard for Detainee Transfer with the name, address, and telephone number of the facility to which such detainee is being transferred immediately prior to the transfer, as well as notice of such transfer to such detainee's representative of record, if any.[441] ICE has acknowledged and taken steps to address these problems and has committed to expediting efforts to provide an online detainee-locator system for lawyers, relatives and others.[442]

Finally, ICE's unfettered discretion to transfer persons between detention facilities has raised a perception of unfairness.[443] For example, advocacy groups argue that ICE officials routinely transfer detainees who have been outspoken or have complained about the conditions of their detention.[444] In addition, some believe that detainees are being transferred to jurisdictions in which the applicable case law is hostile to immigrants' rights.[445]

IV. Recommendations Relating to the Department of Homeland Security

A. Reduce Burdens and Increase Efficiency in the Removal Adjudication System

As discussed above in Section III.A.1, one of the major problems making it extremely difficult for the removal adjudication system to process and decide cases efficiently and fairly is the increasing number of cases entering the system and the lack of sufficient resources to handle these cases.[446] In order to alleviate this burden, we recommend actions not only to increase the resources available but also actions, consistent with existing enforcement priorities, to decrease the number of people being put into the system.

---

439 *See id.*, *supra* note 432, at 70 ("Transferring detainees away from key witnesses and evidence effectively denies them an opportunity to present a defense against removal, which is a violation of their human rights."). For additional specific examples of how transfers impair detainees' abilities to defend themselves in their removal proceedings, see *id.*, *supra* note 432, at 66-71.

440 ICE has required that its system-wide tracking system for detainees be updated within 24 hours of detaining, transferring, or removing a noncitizen, to provide accurate snapshots in time of ICE's detainee population. However, the Office of Inspector General of the Department of Homeland Security reported that the results of its audit found that ICE staff at the five detention facilities tested did not consistently update ICE's tracking system properly or timely. In some cases, the tracking system was not updated to reflect the removal of detainees. Office of Inspector Gen., U.S. Dep't of Homeland Sec., Immigration and Customs Enforcement's Tracking and Transfers of Detainees 3-5 (2009), *available at* http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_09-41_Mar09.pdf; *see* Schriro, *supra* note 365, at 18 (reporting that many detention facilities do not have computer entry screens for ICE's record system, that the recording of detention book-ins and book-outs in ICE's record system frequently occurs after the actual events, and improvements to this system could better ensure the accuracy of the count as well as timeliness.).

The failure to update the detainee tracking system in an accurate and timely manner also limits ICE's ability to ensure the safety of the public, its detention facility staff, and other detainees because ICE staff cannot accurately account for potentially dangerous detainees within its detention system. *See* Office of Inspector Gen., *supra*, at 6.

441 *See* Office of Inspector Gen., *supra* note 440, at 6-8.

442 *See* Fact Sheet, Ice Detention Reform, *supra* note 383.

443 ICE has claimed that the frequency of detainee transfers is partly related to its arrangements with state and local jails under intergovernmental service agreements, which permit such jails to require ICE to transfer detainees upon request, and Human Rights Watch's analysis of detainee transfer data confirms that the majority of detainee transfers originate from local prisons and jails operating under intergovernmental service agreements with ICE. *See* Human Rights Watch, *supra* note 432, at 21; *see also* Schriro, *supra* note 365, at 6 ("Although the majority of arrestees are placed in facilities in the field office where they are arrested, significant detention shortages exist in California and the Mid-Atlantic and Northeast states. When this occurs, arrestees are transferred to areas where there are surplus beds.").

444 *See, e.g.*, Am. Civil Liberties Union of Mass., Detention and Deportation in the Age of ICE: Immigrants and Human Rights in Massachusetts 6 (2008), *available at* http://www.aclum.org/ice/documents/aclu_ice_detention_report.pdf.

445 *See, e.g.*, Human Rights Watch, *supra* note 432, at 36-37 & n.64 (noting that its report does not conclude that there is an intentional ICE policy of transferring detainees to the Fifth Circuit, which is known for legal precedent hostile to the rights of immigrants, but that it appears that there was a significant inflow of detainees from other jurisdictions to at least one of the three states within the jurisdiction of the Fifth Circuit).

446 *See infra* Part 2, Section III.A.1.

1. Increase the Use of Prosecutorial Discretion to Reduce Unnecessary Removal Proceedings and Litigation

If DHS officers and attorneys increase their use of prosecutorial discretion to weed out unnecessary cases or issues, the burden on the removal adjudication system could be lessened significantly. DHS would issue fewer NTAs, resulting in fewer cases in the system and fewer detainees. The number of issues adjudicated in immigration courts likely would decline as well.

a. DHS Officer Prosecutorial Discretion

Training, guidance, support, and encouragement are required to ensure that DHS officers properly exercise prosecutorial discretion. We recommend:

- Communicating to all DHS personnel the view of the DHS Secretary and other senior officials that the appropriate exercise of prosecutorial discretion is not only authorized by law but encouraged;
- Updating existing policies and procedures to make clear that DHS officers and other personnel are expected to exercise prosecutorial discretion to refrain from serving NTAs on persons believed to be prima facie eligible for relief from removal and developing clearer guidelines (with specific examples of situations in which exercises of prosecutorial discretion are expected) to assist DHS officers and other personnel in appropriate exercises of prosecutorial discretion;
- Mandating periodic training on these policies, guidelines, and procedures for DHS officers and other personnel, including senior officials;
- Making DHS attorneys available to consult with and address specific questions from DHS officers and other DHS personnel regarding prosecutorial discretion; and
- Developing metrics to evaluate each DHS officer's compliance with the policies, guidelines, and procedures and rewarding compliance appropriately.

b. DHS Attorney Prosecutorial Discretion

The following steps should be taken to ensure the proper exercise of discretion by ICE and USCIS attorneys (to the extent such steps are not already in progress).

- Each agency should adopt guidelines encouraging the use of prosecutorial discretion in appropriate instances, while precluding such prosecutorial discretion in other circumstances. These guidelines should account for important concerns, such as fairness and efficiency. They should clarify that the mission of DHS attorneys is to promote justice rather than to defeat immigrants' claims in every case. These guidelines should direct DHS attorneys to exercise prosecutorial discretion under at least three circumstances:
  - DHS attorneys should exercise prosecutorial discretion when, in their professional judgment, the courts are unlikely to sustain a position taken by a DHS officer.
  - DHS officers and attorneys alike should use discretion when a proceeding may be rendered moot by other events. For example, when a noncitizen is subject to removal but will almost certainly obtain a visa soon after being deported, the most efficient course may be to forego removal proceedings.
  - DHS attorneys should be willing to stipulate to facts favorable to the noncitizen when appropriate and should advocate for reasonable positions taken by DHS officers in each case, rather than reflexively adopting an adversarial stance.
- When agency management engages in performance reviews of ICE and USCIS attorneys, they should rely on factors other than the number of removal orders obtained, such as success rates in the cases they do bring and professionalism.
- In the ongoing training provided to their attorneys, ICE and USCIS should emphasize the importance of exercising prosecutorial discretion when doing so would be in the interest of justice or efficiency.
- The central legal offices of ICE and USCIS should continually monitor the extent to which the regional legal offices exercise prosecutorial discretion and ensure that they are consistently promoting efficiency while staying within appropriate boundaries.

2. Give DHS Attorneys Greater Control over the Initiation of Removal Proceedings

As described in Section II.C above, Notices to Appear are issued in a variety of agency contexts by CBP, USCIS, and ICE and are subject to substantial discretion, often exercised by employees at varying levels of seniority and experience. Apart from NTAs required by regulation, there appears to be no consistent policy guidance outlining factors to be considered in exercising discretion in the issuance of NTAs. Consequently, discretion is exercised with disparate results.

We recommend that in DHS local offices with sufficient attorney resources the approval of a DHS lawyer be required for the issuance of all discretionary NTAs, and that the DHS lawyer's approval be granted on a case-by-case basis. This should help produce more consistent outcomes and would help to ensure that decisions about the issuance of NTAs would take into account developments in the applicable law. To the extent this approach may contribute to delays in decision making, exceptions could be provided in time-sensitive circumstances, such as cases where detainers need to be issued for noncitizens incarcerated for aggravated felonies.

We recognize, however, that ICE attorneys in larger local offices are currently overwhelmed by their caseloads in immigration proceedings and, therefore, are not in a position to take on the additional burden of screening NTAs. Such screening, therefore, should be undertaken on a pilot basis in smaller offices that have sufficient resources. The results there should be monitored carefully and evaluated to determine the need for and feasibility of extending the system to other offices and the additional resources needed for such extension.

3. To the Extent Possible, Assign Cases to Individual DHS Trial Attorneys

One barrier to the effective exercise of prosecutorial discretion and the efficient handling of cases by DHS trial attorneys is the current practice of assigning attorneys on a hearing-by-hearing basis in removal proceedings at the immigration courts. The result is that several attorneys may have to become familiar with the same case, with no single attorney having overall responsibility for the case.

We recommend that, to the extent possible, DHS assign one DHS trial attorney to each removal proceeding. This would permit that attorney to become familiar with the facts and circumstances of the removal cases assigned to him or her, give the attorney a sense of ownership over those cases, and provide a single contact person to facilitate negotiations and stipulations with opposing counsel. This practice would facilitate the exercise of prosecutorial discretion in a manner consistent with DHS policies.

4. Allow Asylum Officers to Approve Defensive Asylum Claims

The current asylum process distinguishes between the treatment of affirmative asylum claims and defensive asylum claims.[447] Applicants with affirmative claims have the opportunity to present their claims to asylum officers in non-adversarial proceedings, while defensive claims must be adjudicated in the immigration court. Such treatment of defensive claims adds to the substantial workload of immigration courts and ICE attorneys.

In some instances at least, this distinction is somewhat arbitrary. For example, a person who has successfully entered the country illegally, or a person who has entered legally but whose status has since expired, can apply for asylum affirmatively, while a person who is *caught* entering the country illegally, or a person who expresses an interest in applying for asylum while entering legally, will be treated as a defensive applicant.

a. Asylum Claims Made in Expedited Removal Cases

One way to reduce the caseload burden on immigration courts is to allow asylum officers to adjudicate asylum claims raised as a defense to expedited removal in order to determine whether there is a valid asylum claim. The United States Commission on International Religious Freedom ("USCIRF") has suggested that substantial efficiencies could be created and certain unfair effects ameliorated by allowing asylum officers to adjudicate asylum claims at the credible fear stage. As USCIRF noted:

447 *See supra* Section II.C.1.b.

> Allowing asylum officers to grant asylum at this [the credible fear determination] stage would reduce demands on detention beds, EOIR resources, trial attorney time, and reduce the time the bona fide asylum seeker spends in detention.[448]

The asylum officer would be authorized either to grant asylum if warranted or otherwise refer the claim to the immigration court as part of removal proceedings. In the latter case, the asylum officer's narrowing of the issues relating to asylum could serve to focus the immigration court's inquiry.

This reform could have a substantial impact on the immigration courts' workload. In fiscal years 2000 through 2003, more than 90% of persons referred by CBP immigration officers to the Asylum Division for credible fear interviews were found to have a credible fear of persecution.[449] Consequently, some 5,000 defensive asylum claims were added to the workload of the immigration courts.[450] The immigration courts granted relief, in the form of either asylum or withholding or deferral of removal under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, in 28% of these proceedings — or to some 1,400 applicants — in fiscal years 2000 through 2004.[451] If the Asylum Division had retained and adjudicated these asylum claims after the credible fear interview, many if not most of these 1,400 meritorious asylum applications likely would have been granted and never reached the immigration courts.

It is also possible that some of the defensive asylum claims denied by the Asylum Division would be withdrawn or abandoned by the applicants after they were referred to the immigration courts. Approximately 48% of defensive asylum claims completed in the immigration courts in fiscal years 2001 through 2005 were not adjudicated on the merits because they were withdrawn, abandoned, or received an alternative resolution.[452] This "non-adjudication" rate for defensive asylum claims completed in the immigration courts has not changed significantly since fiscal year 2005; approximately 49.1% of defensive asylum claims completed in the immigration courts in fiscal years 2006 through 2008 were not adjudicated on the merits because they were withdrawn, abandoned, or received an alternative resolution.[453] Available data suggest that applicants with *affirmative* asylum claims who are unsuccessful in the Asylum Division are more likely to withdraw or abandon their claims (or receive an alternative resolution) in the immigration courts than persons pressing their defensive asylum claims for the first time in immigration court.[454] It seems reasonable to assume that if asylum officers also adjudicate defensive asylum claims, a greater percentage of these defensive applicants are likely to withdraw or abandon their claims in the immigration courts.

A number of other considerations support allowing asylum officers to adjudicate defensive asylum claims:

- First, in the expedited removal context, if the asylum officer who handles the credible fear interview also adjudicates the asylum claim, then that person is already familiar with both the factual and legal background of a given case from the credible fear interview. Allowing the same officer to review the asylum claim prevents duplication of work.

448 EXPEDITED REMOVAL PART I, *supra* note 338, at 66.

449 *Id.* at 33. However, in late 2008, the DHS Assistant Secretary for Policy, Stewart Baker, told USCIRF that the "screen-in rate" dropped to 63% in 2006 and 60% in 2007. Letter from Stewart Baker, Assistant Sec'y for Policy, Dep't of Homeland Sec., to Felice D. Gaer, Chair, U.S. Comm'n on Int'l Religious Freedom (Nov. 28, 2008).

450 This estimate represents 90% of the 5,376 noncitizens who were referred to the Asylum Division for credible fear proceedings in fiscal year 2003. EXPEDITED REMOVAL PART I, *supra* note 338, at 32.

451 *Id.* at 33; Susan Kyle, Cory Fleming & Fritz Scheuren, *Statistical Report on Immigration Court Proceedings, FY 2001-2004,* at 399 tbl. A, *in* U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL, VOLUME II: EXPERT REPORTS (2005); *see also* U.S. GENERAL ACCOUNTING OFFICE, ILLEGAL ALIENS: OPPORTUNITIES EXIST TO IMPROVE THE EXPEDITED REMOVAL PROCESS 51-52 (2000), *available at* http://www.gao.gov/new.items/gg00176.pdf (30% grant rate for immigration courts). This compares with approximately 35% of affirmative asylum claims that are granted by the Asylum Division. Ramji-Nogales et al., *supra* note 75, at 307.

452 TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, SYRACUSE UNIVERSITY, THE ASYLUM PROCESS (2006) [hereinafter TRAC ASYLUM PROCESS], *available at* http://trac.syr.edu/immigration/reports/159/.

453 *See* EOIR FY2008 STATISTICAL YEAR BOOK, *supra* note 29, at K4.

454 TRAC ASYLUM PROCESS, *supra* note 452.

- Second, it is possible that the initial orientation and interview of applicants in the credible fear screening process could be streamlined — perhaps by combining the orientation with the interview.
- Third, this proposal should be viewed favorably -by various stakeholders in the asylum process. ICE attorneys and immigration courts should value the reduction of their caseload. ICE attorneys would have fewer instances where they were put in the position of opposing meritorious asylum claims. Meritorious asylum applicants should value the opportunity initially to present their claims in a non-adversarial environment, where they are examined by specialists invested in the asylum process.

Since the total number of affirmative asylum applications processed by the Asylum Division has declined during the past decade,[455] assuming the number of asylum officers in the Asylum Division remains fairly constant in the future,[456] the increased workload involved in allowing asylum officers to adjudicated defensive asylum claims would likely be manageable.[457]

A number of objections to, and concerns regarding, the USCIRF proposal have been raised:

- If the credible fear and asylum determinations are combined and/or their sequence accelerated to reduce detention times, applicants may have insufficient time and resources to complete the asylum application, to prepare for the asylum interview, to consult with an attorney or representative, and to obtain documentation to support their claims.[458]
- This combined process may increase the detention time for some asylum applicants who could meet the credible fear standard, but are at the time unable to demonstrate eligibility for asylum.[459]
- Asylum applicants would also have to establish their identity and pass security checks before they could be granted asylum, which would increase their time in detention.[460]
- Accelerated adjudication of an asylum applicant's claim could produce a record of the applicant's testimony that has not benefited from the additional time to prepare the case and consult with counsel that would be provided for in a separate procedure. A record of the testimony created in the course of such a procedure may have consequences for the applicant in later removal proceedings when the case is not approved by the asylum officer in the accelerated process.[461]

Despite these objections and concerns, if the goal is to streamline the adjudication of asylum claims in the immigration system *as a whole*, then the proposal deserves serious consideration.

b. Defensive Asylum Claims Made in Removal Proceedings in the Immigration Courts

It may also be possible to divert to the Asylum Division the adjudication of defensive asylum claims arising in removal proceedings in the immigration courts. This new process would require referring the claim to the Asylum Division and then having it referred back to the immigration court if the asylum officer did not grant the claim. Although this new process would be more unwieldy than the proposed combination of credible fear and asylum determinations in the expedited removal context recommended in Section IV.A.4.a above, it would

---

455 According to the GAO, the total caseload of the Asylum Division declined from approximately 450,000 cases in 2002 to 83,000 cases in 2007. Caseload is defined as "pending and new receipts for asylum, credible and reasonable fear, and NACARA cases." U.S. GOV'T ACCOUNTABILITY OFFICE, U.S. ASYLUM SYSTEM: AGENCIES HAVE TAKEN ACTIONS TO HELP ENSURE QUALITY IN THE ASYLUM ADJUDICATION PROCESS, BUT CHALLENGES REMAIN 62 (2008), *available at* http://www.gao.gov/new.items/d08935.pdf.

456 However, there has been a decline in the number of available asylum officers since fiscal year 2002. During fiscal years 2002 through 2007, the number of available asylum officers ranged from a high of 232 in fiscal year 2003 to a low of 199 in fiscal year 2005, and the Asylum Division of USCIS reported that 163 asylum officers would be available in fiscal year 2008. *Id*. at 150.

457 Interview with Susan Raufer, Ethan Taubes & Lauren Vitiello, Asylum Div., U.S. Citizenship & Immigration Servs.

458 Letter from Stewart Baker, *supra* note 449.

459 *Id*.

460 *Id.*

461 Interview with Joseph Langlois & Jedidah Hussey, Asylum Div., U.S. Citizenship & Immigration Servs.

reduce the number of matters ultimately adjudicated by the immigration courts and the burden on DHS trial attorneys more significantly than would implementing the first proposal alone.[462]

In fiscal year 2008, 14,067 defensive asylum cases were received by the immigration courts.[463] Approximately 3,128 of these cases were referred by asylum officers following credible fear determinations.[464] Accordingly, approximately 11,000 cases were applications made defensively after removal proceedings were initiated in the immigration courts.[465] If these approximately 11,000 defensive asylum cases had been reviewed by asylum officers, and the asylum officers had granted asylum with respect to these cases at the immigration courts' grant rate of 36% for defensive asylum cases in fiscal year 2008,[466] then approximately 4,000 asylum claims would have been disposed of by the Asylum Division and would not have required adjudication by the immigration courts.

c. Authority Required to Implement Recommendations

The current requirement of referring asylum claims arising during the expedited removal process to immigration courts following a positive credible fear determination could be changed without legislative action.[467] Altering the procedure to require asylum officers to adjudicate defensive asylum claims made in removal proceedings in the immigration courts, however, would require Congressional action. Recent legislation provides an opportunity for the Asylum Division and other stakeholders to evaluate the practicability of the latter reform before a legislative solution is proposed.

In connection with the enactment of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 ("TVPRA"), USCIS announced in March 2009 that it is responsible for the initial adjudication of applications for asylum from "unaccompanied alien children" who are in removal proceedings in immigration courts and have not previously filed affirmative asylum applications with USCIS.[468] Prior to the effectiveness of the applicable provisions of TVPRA on March 23, 2009, such children would have been required to file for asylum in immigration court. Under the TVPRA, these unaccompanied children, who have been issued NTAs, must file their initial asylum applications with USCIS.[469]

5. Cease Issuing Notices to Appear to Noncitizens Prima Facie Eligible to Adjust to Lawful Permanent Resident Status

As described in Section III.F.2 above, USCIS has issued NTAs to out-of-status noncitizens despite their eligibility to adjust to LPR status — even following the approval of employment-based immigrant visa petitions filed for their benefit. Permitting DHS to issue NTAs under such circumstances is an inefficient use of adjudicatory resources and unfair to such noncitizens. Accordingly, we recommend that DHS implement a policy of not issuing NTAs, to the extent possible, to noncitizens who may be out of status but are prima facie eligible to adjust to LPR status.

---

462 A possible means of diverting defensive asylum claims to the Asylum Division is pursuant to procedures similar to those recently announced by USCIS in connection with the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110–457, 122 Stat. 5044. *See infra* Section IV.A.4.c and note 468.

463 EOIR FY2008 Statistical Year Book, *supra* note 29, at I1.

464 *See* Human Rights First, *supra* note 211, at 85 n.2 (reporting 3,128 individuals for fiscal year 2008 were found to have credible fear of persecution based on statistics provided by USCIS).

465 This figure was calculated by deducting the number of individuals reported to have been found to have a credible fear of persecution for fiscal year 2008 (*see supra* note 464) from the number of defensive asylum claims received by the immigration courts in fiscal year 2008 (*see supra* note 463) and rounding the resulting figure to the nearest thousand.

466 EOIR FY2008 Statistical Year Book, *supra* note 29, at K3.

467 *See* INA § 235(b)(1)(B)(ii), 8 U.S.C. § 1225(b)(1)(B)(ii) ("If the officer determines at the time of the interview that an alien has a credible fear of persecution . . . , the alien shall be detained for further consideration of the application for asylum."). Requiring asylum officers to adjudicate asylum claims raised in expedited removal proceedings would require, however, some amendment to the regulations related to expedited removal proceedings, such as 8 C.F.R. §§ 208.30(f) and 235.6(a)(1)(ii). *See also* Expedited Removal: Part I, *supra* note 338, at 66.

468 Press Release, U.S. Citizenship & Immigration Servs., USCIS Initiates Procedures for Unaccompanied Children Seeking Asylum: New Law Allows Children in Removal Proceedings to Begin Asylum Process in a Non-Adversarial Setting (Mar. 25, 2009), *available at* http://www.uscis.gov/files/article/tvppa_25mar2009.pdf.

469 The TVPRA also provides an opportunity for any unaccompanied child, who did not previously file for asylum with USCIS and who has a pending claim on appeal to the BIA or in federal court, to have his or her asylum claim heard and adjudicated by a USCIS asylum officer in a non-adversarial setting. *Id.*

B. Implement Mechanisms to Coordinate Immigration Positions and Policies among the Various Components of DHS

As discussed in Section III.B above, DHS's enforcement and application of immigration law have been inconsistent and confusing. This is unfair to those affected, limits the ability of DHS to take a leadership role on immigration policies, and decreases confidence and trust in the immigration adjudication system.

The structure of the immigration functions in DHS makes coordination and consistency in this area challenging. The immigration service and enforcement functions are divided among three co-equal components in DHS, each of which is headed by a Presidential appointee reporting directly to the Secretary of DHS through the Deputy Secretary. The DHS Assistant Secretary for Policy and the General Counsel of DHS play important roles in immigration matters. Each of USCIS, CBP, and ICE has its own policy office reporting directly to the head of such component, while each has its own general counsel, who reports directly to the General Counsel of DHS.

Important cross-cutting issues should be addressed in a coordinated and consistent manner. However, the only persons in DHS with the authority to resolve these disputes are the Secretary and the Deputy Secretary, who are managing an enormous agency with multiple components, of which USCIS, CBP, and ICE are only a part. Moreover, as the Migration Policy Institute observed, this lack of a "robust department-level mechanism" will be a particularly acute problem if immigration reform legislation is enacted.[470]

We recommend, therefore, that DHS create a position to oversee and coordinate all aspects of DHS immigration policies and procedures. This position should have sufficient resources and authority: (1) to ensure coordination among USCIS, CBP, and ICE; (2) to develop and advance its own agenda and goals with respect to immigration policies; and (3) to play a more significant role in developing immigration policies and informing public opinion on these issues.

Others have advocated this approach. For example, the Migration Policy Institute recently recommended the appointment of a Senior Assistant to the Secretary and Deputy Secretary of DHS to channel policy debates, resolve issues, and provide leadership in developing and implementing overall immigration policies and procedures.[471]

C. Amend Unfair Laws that Burden the Removal Adjudication System

While this Report has focused on the *procedures* for removing noncitizens from the United States, we also have identified some substantive provisions of immigration law that are not only unfair to noncitizens but also burden the immigration adjudication system. These include: (1) restrictions on the ability of noncitizens to adjust to LPR status, coupled with the bars on admission; (2) the law authorizing removal of noncitizens convicted of aggravated felonies; and (3) the law authorizing removal of noncitizens convicted of crimes involving moral turpitude.

1. Permit All Noncitizens who are Eligible to Become Lawful Permanent Residents to Adjust Their Status in the United States or Eliminate Bars to Reentry

As described in Section III.F.1 above, a combination of the restrictions on the availability to noncitizens of the adjustment of status procedures under section 245 and the three-year, ten-year, and permanent bars on admission promotes the continued growth in the number of undocumented noncitizens in the United States and limits the availability of a remedy during removal proceedings for which a significant number of noncitizens would otherwise be eligible. If the adjustment of status procedures were made more widely available to undocumented noncitizens, it would transfer most of the burden of adjudicating LPR applications from the immigration courts to USCIS officers, who have extensive experience with such applications.[472]

---

470 *See* CORRECTING COURSE, *supra* note 409, at 93.

471 *Id.* at 94-95; *see also* EXPEDITED REMOVAL PART I, *supra* note 338, at 65-66 (recommending that the Office of the DHS Secretary delegate to one person the authority to coordinate the activities of CBP, ICE, and the Office of Asylum relating to asylum seekers and refugees); HUMAN RIGHTS FIRST, HOW TO REPAIR THE U.S. ASYLUM SYSTEM: BLUEPRINT FOR THE NEXT ADMINISTRATION 4 (2008) (noting that Human Rights First has urged DHS's senior leadership since 2003 to "create effective structures to ensure coordination, attention and commitment to the protection of refugees and asylum seekers.").

472 USCIS has funded its benefit adjudications through the collection of application fees and relies primarily on these fees to cover its operations. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, IMMIGRATION APPLICATION FEES: COSTING METHODOLOGY IMPROVEMENTS WOULD PROVIDE MORE RELIABLE BASIS FOR SETTING FEES 8-9 (2009), *available at* http://www.gao.gov/new.items/d0970.pdf.

Alternatively, repeal of the three-year, ten-year, and permanent bars to reentry would also reduce the number of "out-of-status" noncitizens by encouraging those who are able to become LPRs to legalize their status. Although these bars were intended to deter noncitizens from remaining in the United States without legal status, they actually encourage them to remain in the country because leaving, even if to become an LPR via consular processing, would trigger the applicable bar to reentry.[473]

2. Revise the Definition of Aggravated Felony and Repeal Retroactive Application of the Aggravated Felony Provisions

As described in Section III.C.1 above, the definition of "aggravated felony" has progressively expanded since 1988 and currently is so broad that DHS has initiated removal proceedings against persons convicted of misdemeanors and other minor crimes that are not consistent with any common understanding of the term "aggravated felony."[474] This has contributed to a sharp increase in appeals of removal orders based on aggravated felony convictions and thus has added to the burdens of the removal adjudication system. The fact that 55% of those removed in 2006 on the ground of aggravated felony convictions were processed through administrative removal[475] with no court review makes the need for revision of the aggravated felony provisions particularly acute.

We recommend that Congress amend the definition of "aggravated felony" in the INA to be consistent with the common understanding of the term: a serious felony. Currently, several categories of offenses are aggravated felonies based upon a sentence imposed of one year, even if the sentence is entirely suspended. Other categories of offenses are classed as aggravated felonies without the requirement that any sentence at all was imposed. As discussed above in Section III.C.1, the effect of these provisions is that misdemeanor convictions routinely are classed as "aggravated felonies." Accordingly, we recommend that Congress add to the current definition of aggravated felony a threshold requirement that any such conviction must be of a felony and that a term of imprisonment of "more than one year" must be imposed (excluding any suspended sentence). This threshold requirement will eliminate the inclusion of misdemeanor convictions as "aggravated felonies" under the INA and ensure that only noncitizens who actually are convicted of a felony, with the minimum felony sentence imposed, bear the extreme immigration consequences attached to an aggravated felony conviction. Even this adjustment may leave other minor offenses classified as aggravated felonies, however, if they carry an "indeterminate" sentence, which may be considered a sentence of more than a year.

The addition of this bright-line threshold requirement would accomplish three goals:

- It would restore some consistency between the term Congress used in the statute and the offenses included in the term, so that long-time LPRs with U.S. citizen and LPR family members and extensive ties to the United States will not be automatically removed based upon a minor conviction.
- It would significantly reduce the strain on the immigration adjudication system that is brought by prosecuting a large number of minor offenders as aggravated felons, and the flood of litigation brought by sympathetic petitioners to the federal Courts of Appeals on this issue.
- It would lend greater credibility to the system of administrative removal of persons convicted of aggravated felonies, in which a non-attorney DHS officer is called upon to decide whether a particular conviction is of an aggravated felony, because a non-attorney officer can determine whether a conviction is of a felony and whether the required sentence has been imposed.

---

473 *See supra* Section III.F.1; *see also Shortfalls of 1996 Immigration Reform Legislation: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security & Int'l Law, H. Comm. on the Judiciary* 110th Cong. (2007) (Paul W. Virtue, former Executive Assoc. Comm'r & General Counsel, INS), *available at* http://judiciary.house.gov/hearings/April2007/Virtue070420.pdf ("[F]ar from curtailing illegal immigration and deterring people from overstaying their visas as intended, IIRIRA's new bars to admissibility are actually contributing to the unprecedented rise in the number of undocumented citizens.").

474 *See* Anthony Lewis, *Abroad at Home; 'Measure of Justice,'* N.Y. TIMES, July 15, 2000, at A13 (reporting a number of cases in Georgia in which persons were subject to removal orders as aggravated felons although they had committed minor offenses, including pulling another person's hair, writing $100 worth of bad checks, shoplifting a $39 item, and accidentally shoplifting a child's dress that the individual was trying to exchange).

475 *See supra* Section III.C.2.

The *retroactive* application of the aggravated felony provisions also burdens the system, is unfair, and results in the removal of noncitizens with longstanding ties to the United States and the disruption of their families. We therefore recommend that such retroactive application be eliminated.

3. Revise the Definition of a Crime Involving Moral Turpitude and Reinstate the Application of the Categorical Approach to Moral Turpitude Determinations

a. Require the Imposition of a Sentence of One Year or More for Removal on the Ground of a Single Conviction of a Crime Involving Moral Turpitude or Require a Potential Sentence of More than One Year

As described in Section III.D.1 above, it is a misuse of limited resources and unnecessarily burdensome to bring removal proceedings against an LPR based on a conviction of a single minor offense, such as misdemeanor shoplifting, where no sentence was imposed. Accordingly, we recommend that Congress amend the INA to require that a single conviction of a crime involving moral turpitude is a basis for deportability only if a sentence of more than one year *is imposed*. In the alternative, we recommend that Congress at least require that the offense carry a *potential sentence* of "more than one year," rather than the current "one year or longer." Although this is a difference of only one day, it will eliminate the single no-jail misdemeanor conviction from causing an LPR to become deportable under this section of the INA.

b. Reinstate the Application of the Categorical Approach to Moral Turpitude Determinations

In re Silva-Trevino, 24 I&N Dec. 687 (AG 2008), seeks to impose an authoritative administrative rejection of the categorical approach to determining whether a criminal conviction is of a crime involving moral turpitude in the immigration context. Although the amount of deference that will be accorded to *Silva-Trevino* by the circuit courts remains to be seen,[476] *Silva-Trevino* will potentially cause protracted hearings and delay in a significant number of immigration court proceedings and increase the difficulty of managing the immigration courts' caseloads. In addition, *Silva-Trevino* has created uncertainty as to the immigration consequences of criminal convictions, which may result in increased unwillingness by defendants and their legal counsel to dispose of criminal cases by pleas and uncertainty and disruption in the criminal justice system.

For the reasons set forth in Section III.D.2 above, we recommend that Attorney General Holder withdraw *Silva-Trevino*, which was issued by former Attorney General Mukasey, and reinstate the categorical approach in removal and other immigration proceedings to determine whether a past conviction is for a crime involving moral turpitude.

D. Reform Administrative and Expedited Removal Proceedings

As discussed in Sections III.C.2 and III.E.4 above, the administrative removal of noncitizens convicted of aggravated felonies and the expedited removal of persons apprehended at the border or within the interior of the United States produce removal decisions made by DHS officers that are not open to public scrutiny and are subject to very limited judicial review. Although efficiency is an important goal for the immigration adjudication system, it should be balanced with the goal of ensuring due process for noncitizens. As currently implemented, administrative removal of non-LPRs on the ground of aggravated felony convictions and expedited removal of persons apprehended at the border or within the United States fail to sufficiently ensure due process for noncitizens and, consequently, decrease noncitizens' confidence and trust in the immigration adjudication system.

The limited review of administrative and expedited removal decisions, and the opacity of administrative and expedited removal procedures, are troubling because the decisions produced by them have significant consequences. For example, noncitizens who removed on the ground of aggravated felony convictions pursuant to administrative removal procedures are permanently barred from returning to the United States for any reason. In addition, a noncitizen with a valid nonimmigrant visa, such as a tourist or business person, may be erroneously removed

476 The Ninth Circuit recently described *Silva-Trevino* as a "welcome effort to 'establish a uniform framework' for the determination of crimes involving moral turpitude" but reserved judgment as to the validity of its case law that contravened *Silva-Trevino*'s rejection of the categorical approach. Marmolejo-Campos v. Holder, 558 F.3d 903, 907 n.6, 910 (9th Cir. 2009). The Third Circuit, however, squarely rejected *Silva-Trevino* and reasserted that the categorical approach will be applied in immigration cases predicated on convictions for crimes involving moral turpitude arising in the Third Circuit. Jean-Louis v. Att'y Gen., 582 F.3d 462, 470 (3d Cir. 2009).

and barred from reentry for five years after his or her removal, with no recourse to correct the error. Finally, a noncitizen in expedited removal proceedings who faces persecution or torture upon repatriation has no recourse if he or she is erroneously ordered removed.

The ABA has taken the position that Congress should enact legislation to restore authority to conduct removal proceedings solely by immigration judges and that such proceedings should include the right to have a decision that is based on a record and subject to meaningful administrative and judicial review.[477] The rationale for this policy was recently stated as follows:

> All of these systems [including expedited removal and administrative removal], although they address serious problems in the immigration enforcement system, implicate due process concerns. They expressly exclude the oversight of an impartial adjudicator; they are radically accelerated; they are largely insulated from public scrutiny and judicial review. The continuation and expansion of such hidden systems of administrative procedure violate many of the most fundamental norms of due process.[478]

In furtherance of this ABA position, we recommend that Congress amend the INA to curtail the use of such proceedings for certain noncitizens and to provide a complementary avenue for judicial review.

1. Prohibit Use of Administrative Removal Proceedings to Remove Minors, the Mentally Ill, Noncitizens who Claim a Fear of Persecution or Torture, and Noncitizens with Significant U.S. Ties

Currently, DHS is authorized to initiate administrative removal proceedings on the ground of an aggravated felony conviction against any noncitizen who is not an LPR,[479] but must issue an NTA if the person is an LPR. As noted in Section III.C.2 above, this disparate treatment of LPRs and other noncitizens cannot be justified. However, if such treatment is continued, then we recommend that the following groups of non-LPRs with aggravated felony convictions be removed only by orders issued by the immigration courts.

Unaccompanied minors and the mentally ill. Minors and the mentally ill are particularly "vulnerable" and "may lack the capacity to make informed decisions on even the most basic matters impacting their cases. . . . In fact, they may not be able even to understand the nature of, much less be able to meaningfully participate in, their immigration proceedings."[480] Accordingly, they require the full due process and procedures available in removal proceedings before the immigration courts.

Non-LPRs claiming a fear of persecution or torture. A noncitizen who fears persecution or torture upon return to his or her country of origin, even if he or she is removable on the ground of an aggravated felony conviction, may be eligible for withholding of removal under section 241(b)(3) or withholding or deferral of removal under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Moreover, if he or she has not been convicted of an aggravated felony, then such noncitizen may be eligible for asylum. In any event, non-LPRs who claim a fear of persecution or torture upon return to their countries also require the additional procedural protections available in immigration court proceedings.

Non-LPRs with significant ties to the United States. A non-LPR who can demonstrate that he or she is married to a U.S. citizen or LPR, has minor children who are U.S. citizens or LPRs, or has served in the U.S. military should not be treated differently from an LPR and, therefore, should be entitled to an immigration court proceeding.

---

477 ABA, ENSURING FAIRNESS AND DUE PROCESS IN IMMIGRATION PROCEEDINGS 7 (2008) [hereinafter ENSURING FAIRNESS], *available at* http://www.abanet.org/poladv/transition/2008dec_immigration.pdf; *see also* ABA, DUE PROCESS & JUDICIAL REVIEW (2006), *available at* http://www.abanet.org/poladv/priorities/immigration/pp_duep_judrev.pdf; Letter from Robert D. Evans, Dir., Governmental Affairs Office, Am. Bar Assoc., to Senators (Apr. 4, 2006), *available at* http://www.abanet.org/poladv/letters/immigration/060404letter_cirsenate.pdf ; Letter from Robert D. Evans, Dir., Governmental Affairs Office, Am. Bar Assoc., to Regulations Branch, Office of Regulations & Rulings, Bureau of Customs & Border Prot. (Oct. 12, 2004), *available at* http://www.abanet.org/poladv/letters/108th/immigration101204.pdf.

478 ENSURING FAIRNESS, *supra* note 477, at 7.

479 INA § 238(b), 8 U.S.C. § 1228(b).

480 ENSURING FAIRNESS, *supra* note 477, at 2.

2. Limit Application of Expedited Removal Proceedings to Certain Types of Individuals

Similar concerns are raised by the greatly expanded use of expedited removal proceedings. As discussed in Section III.E above, expedited removal may be applied broadly to any noncitizen who has entered the United States without inspection and cannot show that he or she has been continuously present here for two years. Although the initial application of expedited removal procedures was limited to noncitizens at ports of entry, its use has greatly expanded to include noncitizens apprehended in the interior of the country. Expedited removal orders generally are not subject to review by the immigration courts and the BIA, and judicial review through habeas corpus proceedings is limited to very few types of issues (for example, whether the noncitizen is a citizen or a LPR, refugee, or asylee).

As discussed further below, we recommend that section 235 of the INA and the applicable regulations be amended to limit the application of expedited removal proceedings to individuals meeting all the following criteria: (1) they seek entry into the United States at a port of entry or are observed by a DHS officer crossing a border illegally at the time of their apprehension; (2) they are not unaccompanied minors; and (3) they are not mentally ill.

a. No Application of Expedited Removal Proceedings to Persons within the Interior of the United States

We recommend that section 235 of the INA and the applicable regulations be amended to limit the application of expedited removal proceedings to an individual who either: (1) seeks entry into the United States at a port of entry; or (2) is observed by a DHS officer crossing a border illegally at the time of his or her apprehension. Expedited removal should not apply to noncitizens who are in the interior of the United States because they are entitled to the procedural due process rights set out by the Supreme Court in *Yamataya v. Fisher.*[481] Moreover, in the original notice setting out the original expedited removal procedure limited to ports of entry implemented in 1997, DOJ acknowledged that "application of the expedited removal provisions to aliens already in the United States will involve more complex determinations of fact and will be more difficult to manage."[482]

b. No Application of Expedited Removal Proceedings to Unaccompanied Minors or the Mentally Ill

Concerns about unaccompanied minors and the mentally ill, as noted above in discussing the application of administrative removal procedures to non-LPRs alleged to be removable on the ground of aggravated felony convictions, apply in the expedited removal context as well. Unaccompanied minors are not generally placed into expedited removal other than in certain limited circumstances, and any expedited removal order is required to be reviewed and approved by the District Director or Deputy District Director, in addition to the approvals normally required for expedited removal orders.[483] There is no administrative or judicial review to ensure that these procedures are followed. Moreover, similar protections have not been provided to other groups that face many of the same challenges as unaccompanied minors, particularly the mentally ill.

---

481 In *Yamataya v. Fisher*, 189 U.S. 86 (1903), the Supreme Court held that a noncitizen who has entered the country, even illegally, must not be deported "without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States." *Id.* at 101 (non-citizen alleged that she was denied due process when immigration officer determined she was likely to be a "public charge" and therefore deportable); *see also* Leng May Ma v. Barber, 357 U.S. 185, 187 (1958) (articulating the "entry fiction" doctrine).

482 Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures; Final Rule, 62 Fed. Reg. 10312, 10313 (Mar. 6, 1997).

483 *See* Detention and Removal Officer's Field Manual, Appendix 11-4: Juvenile Protocol Manual 6 (2003), *available at* http://www.ice.gov/doclib/foia/dro_policy_memos/juvenileprotocolmanual2006.pdf; Memorandum from Office of Programs, U.S. Immigration & Naturalization Serv., Unaccompanied Minors Subject to Expedited Removal 3 (Aug. 21, 1997), *available at* http://www.refugees.org/uploadedFiles/Participate/National_Center/Resource_Library/UM%20subject%20to%20ER%2008.97_Virtue_Memo.pdf; *see also* Chad C. Haddal, Congressional Research Service, Report RL33896, Unaccompanied Alien Children: Policies and Issues 6-7 (2007), *available at* http://trac.syr.edu/immigration/library/P1642.pdf. The limited circumstances under which a DHS officer may decide to place an unaccompanied minor in expedited removal include situations where "the minor: [ ] has, in the presence of an INS officer, engaged in criminal activity that would qualify as an aggravated felony if committed by an adult; [ ] has been convicted or adjudicated delinquent of an aggravated felony within the United States or another country, and the inspecting officer has confirmation of that order; or [ ] has previously been formally removed, excluded, or deported from the United States." Memorandum from Office of Programs, U.S. Immigration & Naturalization Serv., *supra*.

3. Limit Expedited Removal Solely to Persons with Improper or Missing Documentation

Under the INA, a CBP officer may remove certain noncitizens without hearing or further review if the officer determines that they are inadmissible because they lack proper documentation[484] or have committed fraud or a willful misrepresentation of facts to gain admission,[485] unless they indicate an intention to apply for asylum or express a fear of persecution. Although CBP officers are unquestionably able during the inspection process at ports of entry to determine whether an individual lacks proper documentation, they are not as well situated to ascertain whether an individual with facially valid documents is committing fraud or making a willful misrepresentation to gain entry into the United States.[486] These are questions that warrant proceedings before an impartial adjudicator in which a more fulsome fact-finding process is followed.

In light of the severe consequences of an expedited removal order and the limited judicial review of such orders, we recommend that section 235(b)(1)(A)(i) be amended, or that DHS take appropriate regulatory action, to provide that CBP officers may order the removal of a noncitizen solely on the basis of a determination that he or she lacks proper documentation. If a CBP officer believes that an individual with a facially valid document, such as a business visa or H-2A visa, is inadmissible because he or she is committing fraud or making a willful misrepresentation, then an NTA should be issued to place this individual in removal proceedings before the immigration court.

4. Improve Supervision of Inspection Process at Ports of Entry and Border Patrol Stations and Make Any Recording of Interviews of Noncitizens during the Inspection Process Available to Such Noncitizens and Their Representatives

Several steps should be taken to improve the quality control of CBP officers' contact with noncitizens at ports of entry and border patrol stations. First, DHS should expand the use of videotaping systems, which are in place at Houston International Airport and Atlanta International Airport, to all major ports of entry and border patrol stations. Regular review of these videotapes by DHS supervisors and managers and retention of the tapes would better enable DHS to deter CBP officers from pressuring noncitizens into withdrawing their asylum claims, protect the officers from erroneous allegations of improper conduct, and allow for the review and refinement of policies, procedures, and training for officers. In addition, we recommend that testers be used by CBP from time to time to verify that CBP officers implement proper procedures.[487] Finally, we recommend that a copy of any videotape or other recording of the interview of a noncitizen during expedited removal proceedings be made available to such noncitizen and his or her representative for use in his or her defense from removal.[488]

---

484 INA § 212(a)(7), 8 U.S.C. § 1182(a)(7).

485 INA § 212(a)(6)(C), 8 U.S.C. § 1182(a)(6)(C).

486 For example, in May 2008, a CBP officer refused entry to Domenico Salerno, a 35-year-old Italian lawyer who was attempting to visit his fiancée, based on an erroneous determination that Mr. Salerno was attempting to gain employment in the United States, and refused to allow him to return to Italy based on an erroneous belief that he had requested asylum. Nina Bernstein, *Italian's Detention Illustrates Dangers Foreign Visitors Face*, N.Y. TIMES, May 14, 2008, *available at* http://www.nytimes.com/2008/05/14/us/14visa.html.

487 These proposals are recommended by USCIRF. EXPEDITED REMOVAL: PART I, *supra* note 338, at 74; *see also* Schoenholtz, *supra* note 334, at 334 (recommending similar measures).

488 In many cases, immigration judges and DHS trial attorneys use the Form I-876B produced by the inspecting CBP officer during expedited removal proceedings to impeach a noncitizen's credibility. *See* Jastram & Hartsough, *supra* note 74, at 68-70. A videotape or other recording of the applicable inspection interview is likely to produce a more accurate transcription of such interview than will the Form I-876B. Therefore, such videotape or other recording could be used to refute any attempted impeachment of the noncitizen's testimony based on the Form I-867B.

5. Expand Judicial Review of Administrative and Expedited Removal Orders

a. Administrative Removal Orders on the Ground of Aggravated Felony Convictions

An administrative removal order on the ground of a conviction of an aggravated felony is now subject to very limited judicial review,[489] while a similar removal order issued by an immigration court is subject to review by the BIA and the federal courts to the same extent as other removal orders issued by immigration courts.

If DHS officers continue to have the power to remove non-LPRs on the ground of aggravated felony convictions, then for the reasons discussed in Part III.C.2 above, we recommend that the immigration courts be empowered and authorized to review DHS determinations that the conviction was for an aggravated felony and that the person is not a minor, is not mentally ill, does not fear persecution or torture upon return to his or her country of origin, and does not have significant ties to the United States.

b. Expedited Removal Orders

Expedited removal orders also are not subject to review by the immigration courts and the BIA. Judicial review is available only in habeas corpus proceedings and is limited there to whether the petitioner is a noncitizen, was ordered expeditiously removed, or was previously granted LPR, refugee, or asylee status.[490] We recommend that this review be expanded to allow a court to consider whether the petitioner was properly subject to expedited removal and to review challenges to adverse credible fear determinations.

E. Improve Efficiency and Fairness by Revising Detention Policies

The stated purpose of detention of a noncitizen in a removal proceeding is to ensure that this noncitizen appears for his or her removal proceeding. However, since the expansion of the mandatory detention provisions in 1996, an enormous and growing system of immigration detention has emerged, which is costly, extremely difficult to manage, and overburdened. As discussed in Section III.G above, in recent years, DHS has expanded the reach of its detention policies to sweep in greater numbers of noncitizens and has restricted the availability of parole and viable alternatives to detention, despite evidence that such alternatives are effective and more economical means of ensuring most noncitizens' appearance in removal proceedings. In addition, as discussed in Section III.G.5 above, DHS's exercise of discretion with regard to detainees' locations has adversely affected the removal adjudication system.

The current mandatory detention provisions are too broad and require the government to spend resources inefficiently. They should, therefore, be eliminated or narrowed to target persons who are clearly flight risks or pose a threat to national security, public safety, or other persons. If such statutory changes are not adopted, we recommend that DHS implement policies with the purpose of avoiding detention of persons who are not subject to mandatory detention, are not flight risks, and do not pose a threat to national security, public safety, or other persons.

1. When Possible, Exercise Discretion to Refrain from Detaining Persons Not Subject to Mandatory Detention

Advocates and commentators have suggested that DHS's policy on detention appears simply to be to detain the maximum number of noncitizens, with release allowed only in exceptional circumstances and that a culture of detention appears to have pervaded DHS.[491]

We are not aware of any written policy that sets forth a "default" DHS policy of detaining all noncitizens, and those interviewed did not believe there was one, but there appears to be a "tone" favoring detention at DHS, especially for those individuals with prior criminal arrests.[492] In addition, there is risk inherent when a DHS officer declines to

489 The federal courts have jurisdiction to review the threshold question depriving the court of jurisdiction (*e.g.*, whether a petitioner has been convicted of an offense that is an "aggravated felony"), and the federal courts also retain jurisdiction where an appeal is based on constitutional claims, such a lack of procedural due process. *See supra* Section III.C.2*; see also infra* Part 4.

490 INA § 242(e)(2), 8 U.S.C. § 1252(e)(2). *See supra* Section III.E.

491 *See, e.g.*, Interview with Nancy Morawetz, *supra* note 421.

492 *See, e.g., id.*

detain a noncitizen; if this noncitizen were to commit any crime or to abscond following his or her release, the DHS officer may suffer criticism and some negative career and other consequences. In sum, exercising discretion to refrain from detaining noncitizens is risky for individual DHS officers, while detaining them is the "standard" procedure.

DHS should "reset" its policies to allow — and to encourage — officers to exercise discretion *not* to detain noncitizens in the immigration system. Such changes would require forceful communication of standards to guide their discretion, as well as firm supervision by regional and lower-level administrators.

2. Improve and Expand Alternatives to Detention and Use Them Only for Persons who Would Otherwise Be Detained

As originally presented to (and funded by) Congress, the alternatives to detention program was built upon models developed by nonprofit organizations that gave detainees a way to leave detention while ensuring their appearance at immigration proceedings and, for those awaiting removal, discouraging them from absconding. The program provided a cost-effective means of reducing detention and detention costs. Although ICE's current alternatives to detention programs retain some features of the nonprofit model, they resemble custody in many respects. In addition, ICE has limited participation in these programs and appears to have used them to supervise individuals who may be eligible for release — or at the very least, for parole or bond.[493]

We recommend that ICE re-evaluate its current alternatives to detention programs to develop new programs that, like the Vera Institute of Justice's AAP, provide referrals to social and legal service agencies to encourage participants to appear at their immigration court hearings and are more supervisory, and less custodial, in nature. Such an alternative to detention program, however, may not be appropriate for a noncitizen required to depart the United States pursuant to a final removal order. For such persons, we recommend that other alternatives to detention programs, which combine more intense supervision and risk of re-detention for violating rules, be developed. To use all of such alternatives to detention programs most effectively, ICE should develop criteria for determining eligibility for participation in any of these programs and the appropriate level of supervision for each participant. For example, electronic monitoring would more appropriately be used to supervise individuals who would otherwise be detained by ICE. In addition, we recommend that DHS determine whether ICE's current alternatives to detention programs constitute custody for purposes of the INA; if so, ICE could extend such programs to mandatory detainees who do not pose a danger to the community or a national security risk and for whom the risk of flight, within the parameters of the programs, is minimal. This could result in significant savings to the federal government.[494]

We recognize that DHS and ICE have announced new initiatives as part of the comprehensive immigration detention reforms, including new initiatives for the reform of ICE's alternatives to detention programs,[495] which we applaud. These new initiatives promise an expansion in the use of alternatives to detention by ICE that we hope will be consistent with our recommendations.

3. Expand the Use of Parole to Reduce the Detained Population of Asylum Seekers

We recommend that DHS should grant parole where asylum seekers have established their identities, community ties, lack of flight risk, and the absence of any threat to national security, public safety, or other persons. In addition, parole determinations should be conducted as a matter of course for asylum seekers who have completed the credible fear screening.[496]

We acknowledge that ICE will change its parole policy, effective as of January 4, 2010, in a manner consistent with these recommendations.[497] According to

493 *See supra* Section III.G.3.

494 *See* KERWIN & LIN, *supra* note 374, at 31; CORRECTING COURSE, *supra* note 409, at 55-56.

495 *See* Press Release, Immigration Detention Reform Initiatives, *supra* note 365. For a brief description of the proposed reforms to ICE's alternatives to detention programs, see *supra* Section III.G.3.

496 Some advocates have expressed their support for these recommendations. *See, e.g.*, Letter from Eleanor Acer, Dir., Human Rights First Refugee Prot. Program, to Julie Myers, Ass't Sec'y, U.S. Immigration & Customs Enforcement, New ICE Directive on Parole of Asylum Seekers, at 2-3 (Nov. 15, 2007) *available at* http://www.humanrightsfirst.info/pdf/071120-asy-hrf-ltr-ice-parole-dir.pdf.

497 *See supra* Section III.G.4.a.

ICE Assistant Secretary John Morton, pursuant to this revised policy, "ICE will generally release from detention arriving asylum seekers who have a credible fear of persecution or torture if certain criteria are met," and such criteria include establishing their identities, posing neither flight risks nor dangers to the community, and having no additional factors that weight against their release.[498] We welcome the change ICE is making to its parole policy, but it remains to be seen whether the application of this revised parole policy by ICE will be consistent with our recommendations.

4. Increase Controls on the Location and Transfers of Detainees

Currently, noncitizens who have been apprehended by DHS are often detained in remote facilities located outside of their state of residence and where they have limited access to family members, counsel, and other necessary resources. DHS should adopt regulations and policies to avoid such dislocations whenever possible.

In addition, we urge ICE to take steps to improve its compliance with ICE's National Detention Standard for Detainee Transfers.[499] Finally, we recommend that DHS upgrade its data systems and improve its processes to permit better tracking of detainees within the detention system.[500]

498 Press Release, U.S. Immigration & Customs Enforcement, ICE Issues New Procedures for Asylum Seekers as Part of Ongoing Detention Reform Initiatives (Dec. 16, 2009), *available at* http://www.ice.gov/pi/nr/0912/091216washington.htm.

499 *See supra* Section III.G.5.

500 We recognize that ICE has announced that it is accelerating the development of an online locator system for attorneys, family members, and others. *See* Fact Sheet, Ice Detention Reform, *supra* note 383. The successful implementation of an accurate online locator system by ICE would address the concern raised in Section III.G.5 above that detainees' legal counsel, family, and friends are often unable to determine where such detainees are located, which impairs their ability to assist the detainees in defending against removal.

2

Immigration Judges and Immigration Courts

Reforming the Immigration System

Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases

Prepared by Arnold & Porter LLP for the American Bar Association Commission on Immigration

American Bar Association
Commission on Immigration
740 Fifteenth Street, NW
Washington, DC 20005-1022
202-662-1005

Part 2: Immigration Judges and Immigration Courts
Table of Contents

I. Introduction on Immigration Judges and Immigration Courts 2-4
II. Background on Immigration Judges and Immigration Courts 2-4
A. The Creation and Organization of the Immigration Courts 2-6
B. The Nature of Immigration Court Proceedings 2-8
C. The Hiring, Training, Supervision, and Discipline of Immigration Judges 2-9
1. The Hiring of Immigration Judges 2-10
2. Professional Development and Training Resources 2-11
3. Supervision, Performance, and Discipline of Immigration Judges 2-12
a. Caseload Management 2-12
b. Supervision and Performance Reviews 2-13
c. Ethics and Conduct of Immigration Judges 2-14
d. Complaints and Discipline 2-14
4. Tenure, Retention, and Removal of Immigration Judges 2-15
III. Issues Relating to Immigration Judges and Immigration Courts 2-15
A. Immigration Judges 2-16
1. Large Caseloads and Inadequate Staffing 2-16
2. Issues with the Selection of Immigration Judges 2-18
a. Inadequate Standards and Lack of Public Input 2-18
b. Lack of Diversity Among Immigration Judges 2-19
c. Bias and Lack of Proper Temperament 2-19
3. Insufficient Training and Professional Development 2-19
4. Inadequate Supervision and Discipline 2-21
a. Lack of Appropriate Supervision 2-21
b. Lack of Transparency and Accountability in Discipline 2-22
c. Improper Political Influence 2-24
5. Tenure, Retention, and Removal of Immigration Judges 2-24
B. Problems With Immigration Court Proceedings 2-25
1. The Way in Which Decisions Are Rendered 2-25
2. Inadequate Technological Resources 2-26
3. Problems with Videoconferencing 2-26
C. Status of 2006 Reforms Announced by the Attorney General 2-27
IV. Recommendations Relating to Immigration Judges and Immigration Courts 2-28
A. Recommended Changes to the Hiring, Tenure, and Removal of Immigration Judges 2-29
1. Provide Additional Hiring Criteria and More Public Participation in the Hiring Process 2-29
a. Additional Hiring Criteria 2-29
b. More Public Participation in the Hiring Process 2-29
2. Protect Immigration Judges from Removal Without Cause 2-29

B. Recommended Changes to Supervision and Discipline of Immigration Judges....2-30
1. Improve Supervision of Immigration Judges by Increasing the Number of ACIJs and Expanding Their Deployment to Regional Courts....2-30
2. Consolidate, Clarify, and Strengthen Codes of Ethics and Conduct Applicable to Immigration Judges....2-31
3. Implement Judicial-Model Performance Reviews for Immigration Judges....2-32
4. Make the Disciplinary Process for Immigration Judges More Transparent and Independent....2-35
C. Recommended Changes to the Administration and Procedures of the Immigration Courts....2-36
1. Request Additional Immigration Judges and Support....2-36
2. Require More Written, Reasoned Decisions....2-38
3. Increase Administrative Time Available to Immigration Judges....2-39
4. Provide Additional Training and Support for Immigration Judges....2-39
5. Improve Data Collection and Analysis Regarding the Performance of Immigration Judges and Immigration Courts....2-40
6. Integrate Technology into Immigration Courtrooms to Facilitate Fair and Efficient Proceedings....2-40
a. Expand Digital Audio Recording Systems....2-40
b. Limit the Use of Videoconferencing....2-41
7. Make Greater Use of Prehearing Conferences....2-41

Part 2: Immigration Judges and Immigration Courts

I. Introduction on Immigration Judges and Immigration Courts

Each year, the nation's immigration courts and judges hear and complete more than 300,000 proceedings, motions and other immigration matters. The immigration courts are the trial-level adjudicator of immigration claims, and their resolution of removal charges against noncitizens, including asylum claims for those asserting they are fleeing persecution, as well as other claims, profoundly affects the lives of the individuals involved.

In Section II of this Part, we discuss (1) the history and organization of the immigration courts within the Executive Office for Immigration Review ("EOIR") in the Department of Justice ("DOJ"); (2) the nature of immigration court proceedings; and (3) the hiring, training, and discipline of immigration judges. In Section III, we describe numerous concerns relating to immigration judges and the immigration courts.

- First, we describe concerns relating to the judges themselves, including large caseloads and inadequate staffing; inadequate hiring standards and a lack of public input into the hiring process; lack of diversity of background; a lack of experience in immigration law; bias and lack of proper judicial temperament; inadequate training and professional development; lack of appropriate supervision; lack of transparency and accountability in the disciplinary system; improper political influence on the judges; and the lack of job security.
- Second, we describe concerns with immigration court proceedings, including the lack of technological resources and support services; the unavailability of written transcripts of proceedings; and the recent growth in the use of videoconferencing for detained persons in removal proceedings.
- Third, we review the status of reforms announced in 2006 by Attorney General Gonzales in response to harsh criticisms from federal appellate courts and others.

In Section IV, we set forth our recommendations for addressing the concerns described in Section III. We recommend improvements to the immigration courts that would apply as long as they remain as part of DOJ and during any interim or transitional period leading up to full restructuring of the immigration court system (as proposed in Part 6 of this Report). All of these recommendations, with the exception of hiring recommendations, also would be applicable in the proposed restructured system, as more fully described in Part 6. Our recommendations include:

- providing additional hiring criteria and more public participation in the hiring process;
- protecting immigration judges from removal without cause;
- increasing the number of Assistant Chief Immigration Judges ("ACIJs") and expanding their deployment to regional courts;
- strengthening the codes of conduct and ethics applicable to immigration judges;
- implementing judicial model performance reviews;
- improving the transparency and independence of the disciplinary system for immigration judges;
- requesting funding for additional immigration judges and support for them to handle the burgeoning caseloads;
- requiring more written decisions;
- increasing the amount of administrative time available to immigration judges;
- providing more and improved training opportunities;
- improving data collection and analysis regarding the performance of immigration judges and courts;
- giving priority to the installation of digital audio recording equipment;
- limiting the use of videoconferencing to procedural matters where the noncitizen has given his or her approval;
- and making greater use of prehearing conferences.

II. Background on Immigration Judges and Immigration Courts

Each year the immigration courts issue several hundreds of thousands of decisions, only a small fraction of which are ever appealed. For example, in 2008, the immigration courts rendered decisions in

some 229,000 proceedings, and 91% of these decisions were not appealed by either side.[1] Thus, for nine out of ten proceedings, the immigration courts represent the end of a noncitizen's case.

Petitions for asylum in particular implicate, in the words of the Supreme Court, "all that makes life worth living."[2] The ultimate fate of many asylum applications is conclusively determined during proceedings before single immigration judges, without any review by the Board of Immigration Appeals ("BIA" or "Board") or federal courts.

Moreover, noncitizens appearing before the immigration courts represent some of the most vulnerable members of society, many of whom lack not only financial means, but also familiarity with American society, its laws, and its language. As one federal appellate court has so aptly stated, an unrepresented detainee must face the "labyrinthine character of modern immigration law — a maze of hyper-technical statutes and regulations that engender waste, delay, and confusion for the Government and petitioners alike."[3]

For several years now, the performance of the immigration courts has come under close scrutiny and considerable criticism. This is not altogether surprising in a system where 231 immigration judges, spread across 57 locations, are charged with making significant, fact-intensive decisions and are expected each year to handle more than 1,500 matters, including over 1,000 proceedings, each. In 2003, then-Chief Judge John M. Walker, Jr. of the U.S. Court of Appeals for the Second Circuit explained that he "fail[ed] to see how Immigration Judges can be expected to make thorough and competent findings of fact and conclusions of law under . . . circumstances" where, "[w]ith only 215 judges, a single [immigration judge] has to dispose of 1,400 cases a year or nearly twenty-seven cases a week. . . ."[4] This burden has only grown. According to Syracuse University's Transactional Records Access Clearinghouse ("TRAC"), from 2000 to 2007, the number of immigration judges decreased (from 206 to 205), while the caseload climbed during that time by 32%.[5]

On August 9, 2006, following a number of rulings by federal appellate courts that harshly criticized immigration courts for inadequate decisions, including a lack of reasoning and bad behavior by the judges, and studies documenting dramatic disparities in asylum decisions, then-Attorney General Alberto Gonzales announced 22 reform measures designed to improve the functioning of immigration courts and the Board. Those reforms included measures aimed at improving training, oversight, and discipline of immigration judges, enhancing resources available to immigration judges and the BIA, and improving immigration court and BIA procedures.[6]

By September 8, 2008, some of these measures had been put in place, and EOIR reported that only five measures remained pending as of June 8, 2009.[7] As discussed in Sections III and IV below, these and other measures represent a promising start to the reforms that are needed to repair the reputation and performance of America's immigration courts. Much, however, remains to be done.

This section provides a brief history and background on the immigration court system, including (1) the creation and organization of the current immigration court system; (2) the role of immigration judges in the immigration adjudication system; and (3) the hiring, training, supervision, and

---

1 EOIR, U.S. Dep't of Justice, FY 2008 Statistical Year Book, at Y1, Fig. 32 (2009) [hereinafter EOIR FY 2008 Statistical Year Book]. In its Year Book, EOIR distinguishes between "proceedings" and "matters." In proceedings, respondents "appear before an immigration judge and either contest or concede the charges against them." *Id.* at B1. A matter includes not only proceedings, but also bond redeterminations, where a noncitizen in custody seeks release on his or her own recognizance or seeks a reduction in the amount of bond, and motions, where the noncitizen or DHS may request that an immigration judge reopen or reconsider a case. *Id.*

2 Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

3 *See* Drax v. Reno, 338 F.3d 98, 99 (2d Cir. 2003).

4 *Id.*

5 TRAC, Immigration Report, Maximum Average Minutes Available per Matter Received, http://trac.syr.edu/immigration/reports/189/include/minutes.html (last visited Nov. 3, 2009).

6 Department of Justice, Measures to Improve the Immigration Courts and the Board of Immigration Appeals (August 9, 2006), *available at* http://trac.syr.edu/tracatwork/detail/P104.pdf [hereinafter Attorney General Reform Measures].

7 *See* U.S. Executive Office for Immigration Review Fact Sheet, EOIR's Improvement Measures – Progress Overview (Sept. 8, 2008), *available at* http://www.usdoj.gov/eoir/press/08/EOIRs22ImprovementsProgressOverview090508v2.pdf [hereinafter EOIR Progress Overview]; U.S. Executive Office for Immigration Review Fact Sheet, EOIR's Improvement Measures – Update (June 5, 2009), *available at* http://www.justice.gov/eoir/press/09/EOIRs22ImprovementsProgress060509FINAL.pdf [hereinafter EOIR Improvements Update].

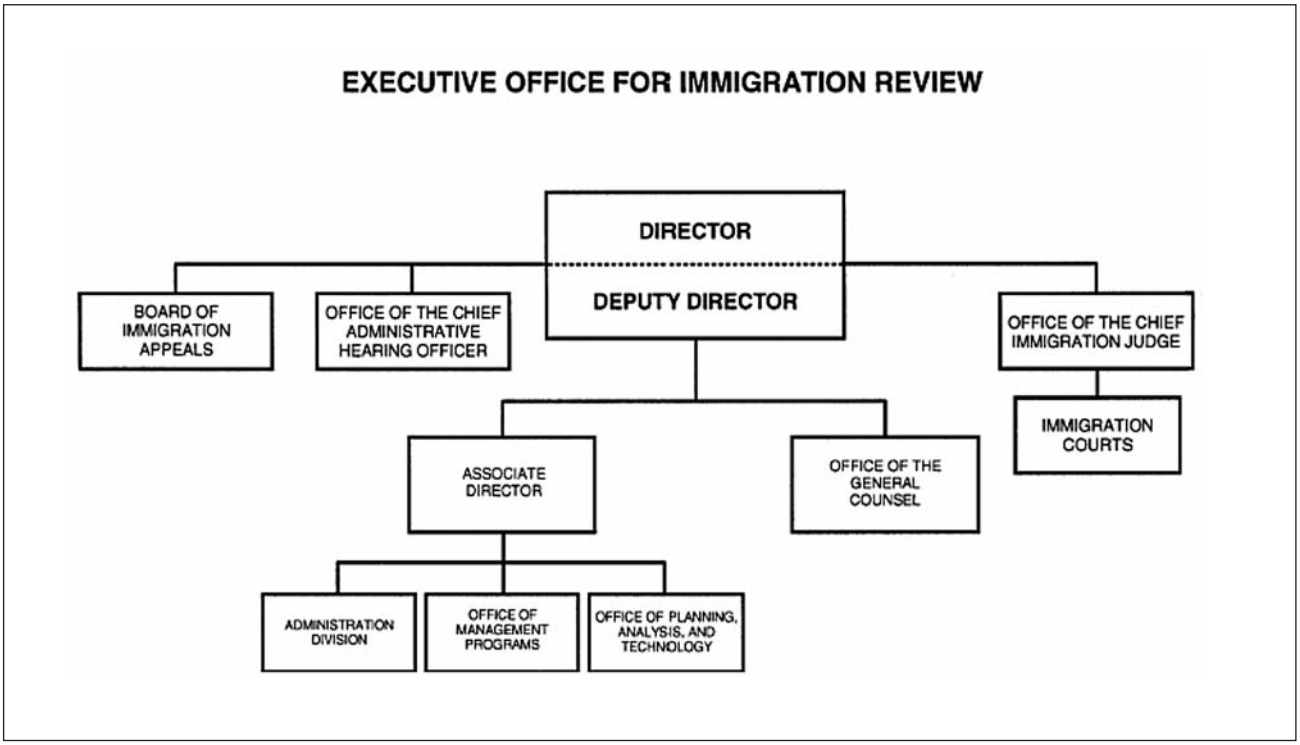
discipline of immigration judges. This history and background provide the context for the current concerns and recommended solutions discussed in Sections III and IV.

A. The Creation and Organization of the Immigration Courts

In January 1983, the Attorney General ("AG") conducted an internal reorganization of DOJ. Prior to 1983, the immigration courts and the Board were part of the Immigration and Naturalization Service ("INS"), which also housed the immigration law enforcement branch. The reorganization moved these bodies to a newly created separate agency within DOJ, the Executive Office for Immigration Review.[8] The aim of the separation was to foster independence from INS and to increase accountability in the immigration hearing process by concentrating the "quasi-judicial" functions in a single agency.[9]

EOIR sits within DOJ and answers directly to the Deputy Attorney General.[10] The AG determines the structure of EOIR (see Figure 1). The AG appoints a Director to head EOIR, who supervises the heads of the offices within EOIR. These include the BIA and the Office of the Chief Immigration Judge ("OCIJ").

The Chief Immigration Judge ("CIJ") supervises the immigration courts and the immigration judges. The CIJ has a team of ACIJs to aid the administration of the courts.[11] Each individual court is assigned to one of the ACIJs for oversight.[12] Each immigration court is



Source: DOJ, Functions Manual, http://www.justice.gov/jmd/mps/manual/eoir.htm

8 Immigration Review Function, Editorial Amendments, 48 Fed. Reg. 8,038 (Feb. 25, 1983) (codified at 8 C.F.R. § 1003.0) [hereinafter Immigration Review Function].

9 *Id.*; *see also* Hon. Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish an Article I Immigration Court*, 13 BENDER'S IMMIGR. BULL. 1 (2008); EOIR, Background Information, http://www.usdoj.gov/eoir/background.htm (last visited Nov. 3, 2009).

10 Immigration Review Function, *supra* note 8, 48 Fed. Reg. at 8,039.

11 As of December 2009, there were ten ACIJs. EOIR Fact Sheet, Office of the Chief Immigration Judge Biographical Information, http://www.usdoj.gov/eoir/fs/ocijbio.htm (last visited Jan. 31, 2010) [hereinafter OCIJ Biographies].

12 *See* EOIR, U.S. Dep't of Justice Immigration Court Listing, http://www.usdoj.gov/eoir/sibpages/ICadr.htm (last visited Nov. 3, 2009) [hereinafter EOIR Immigration Court Listing] (anywhere from three to eleven immigration courts are assigned to each Assistant Chief Immigration Judge).

also assigned a Court Administrator who manages the daily activities of the court and supervises the court's administrative staff.

The Office of the Chief Administrative Hearing Officer was created in 1987.[13] The Chief Administrative Hearing Officer works under the Director of EOIR to supervise hearings on unauthorized employment of noncitizens.[14]

The Attorney General holds the authority to appoint the immigration judges.[15] This process is different from that used in selecting state judges, federal judges, and administrative law judges ("ALJs"), all of whom are selected by an external body, the electorate, or other judges.[16]

The immigration judges generally may only hear proceedings under Section 240 of the Immigration and Nationality Act ("INA") or those the Attorney General delegates to them.[17] Immigration judges are neither judges under either Article III or Article I of the U.S. Constitution,[18] nor are they administrative law judges under the Administrative Procedure Act. Rather, an immigration judge is defined by statute as "an attorney whom the Attorney General appoints as an administrative judge within the Executive Office for Immigration Review, qualified to conduct specified classes of proceedings, including a hearing under section 1229a of this title [removal proceedings]. An immigration judge shall be subject to such supervision and shall perform such duties as the Attorney General shall prescribe."[19] The Code of Federal Regulations mandates that the immigration judges "act as the Attorney General's delegates in the cases that come before them."[20]

As of November 2009, EOIR employed 231 immigration judges who sit on 57 courts which are located in 28 states.[21] The largest concentrations of judges and courts are in California (55 judges sitting on 7 courts); Florida (28 judges sitting on 3 courts); New York (31 judges sitting on 6 courts); and Texas (25 judges sitting on 8 courts, one of which is without a judge).[22]

According to the Immigration Court Practice Manual, which took effect in July 2008, immigration judges are "tasked with resolving cases in a manner that is timely, impartial, and consistent with the Immigration and Nationality Act, federal regulations, and precedent decisions of the Board of Immigration Appeals and federal appellate courts."[23] The majority of the proceedings that immigration judges hear are removal proceedings,[24] but they also conduct other proceedings, including:

- Bond redetermination hearings for noncitizens who are in Department of Homeland Security ("DHS") detention;

13 EOIR, Background Information, *supra* note 9.

14 28 C.F.R. § 68.2.

15 8 C.F.R. § 1003.10(a). As described in Section II.C, *infra*, however, the appointment of immigration judges has historically been overseen by the Chief Immigration Judge or other delegates of the Attorney General.

16 The President nominates the Article III judges, and the Senate confirms their appointment. *See* U.S. CONST. art. II, § 2, cl. 2; 28 U.S.C. §§ 44, 133. Federal bankruptcy judges are appointed by the judges of the circuit courts of appeals. *See* 28. U.S.C. § 152. Federal magistrate judges are appointed by federal district court judges. *See id.* § 631. State law judges are appointed (typically by the state governor) or elected. *See, e.g.*, N.Y. CONST., art IV, § 2 (vesting appointment of court of appeals judges in the governor); CAL. CONST. art. VI, § 16 (providing for the election of judges nominated by the governor). Federal administrative law judges are appointed by the federal agencies through a process managed by the U.S. Office of Personnel Management. *See* 5 U.S.C. § 3105; 5 C.F.R. § 930.201.

17 8 C.F.R. § 1003.10(a). Section 240 of the INA governs the conduct of removal proceedings. *See* 8 U.S.C. § 1229a.

18 *See generally* CHARLES ALAN WRIGHT ET AL., 20 FEDERAL PRACTICE & PROCEDURE DESKBOOK § 5 (2008).

19 8 U.S.C. § 1101(b)(4); 8 C.F.R. § 1003.10(a).

20 8 C.F.R. § 1003.10(a).

21 Interview with EOIR, Nov. 2009. *See also* EOIR Immigration Court Listing, *supra* note 12 (listing 234 immigration judges as of October 2009); TRAC, IMMIGRATION REPORT, CASE BACKLOGS IN IMMIGRATION COURTS EXPAND, RESULTING WAIT TIMES GROW, http://trac.syr.edu/immigration/reports/208/ (last visited Nov. 3, 2009) [hereinafter TRAC BACKLOG REPORT] (reporting 238 immigration judges as of May 15, 2009). The number of immigration judges reported by EOIR includes the five ACIJs (out of nine total) that have active caseloads. The number reported by TRAC includes all ACIJs. The number of courts includes courts that are part of detention centers.

22 EOIR Immigration Court Listing, *supra* note 12. As of October 2009, the immigration court in Port Isabel, Texas was without a sitting judge. *Id.*

23 EOIR, U.S. DEP'T OF JUSTICE, IMMIGRATION COURT PRACTICE MANUAL § 1.2(a) (2008) [hereinafter IMMIGRATION COURT PRACTICE MANUAL].

24 In fiscal year ("FY") 2008, immigration courts received 291,781 proceedings. Of these, 285,178 were removal proceedings. *See* EOIR FY 2008 STATISTICAL YEAR BOOK, *supra* note 1, at C3.

- Rescission hearings to determine whether a lawful permanent resident ("LPR") was wrongfully granted LPR status;
- Withholding-only hearings to determine whether a noncitizen subject to a removal order is eligible for withholding of removal under the INA or the Convention Against Torture;
- Asylum-only hearings for those who are denied removal hearings, including stowaways, crewmen, Visa Waiver Pilot Program claimants, and those ordered removed from the United States for security reasons;
- Reviews of DHS "credible fear" determinations;
- Reviews of Asylum Officers' "reasonable fear" determinations; and
- Reviews of "claimed status" determinations by DHS, where the noncitizen has claimed U.S. citizenship, lawful permanent residence, or another basis for lawful presence.

In administering these proceedings, immigration judges fill fact-finding and decision-making roles, and typically issue decisions orally from the bench. Decisions by immigration judges are considered final unless a party files a timely appeal to the Board of Immigration Appeals or a decision is certified to the Board.

B. The Nature of Immigration Court Proceedings

Immigration court proceedings are governed by a body of federal statutes, administrative regulations, international covenants, and Board of Immigration Appeals and federal case law.[25] Immigration court proceedings are intended to explore and ultimately answer — through the presentation of evidence, the examination of witnesses, and argument by the noncitizen and the government — the legal and factual bases of immigration cases.[26]

The rules governing immigration court proceedings are more relaxed than the Federal Rules of Civil Procedure and the Federal Rules of Evidence or the rules promulgated under the Administrative Procedure Act for administrative agencies. Rather, regulations issued pursuant to the INA provide that immigration courts "shall receive and consider material and relevant evidence."[27] Some immigration courts have attempted to impose restrictions on the admissibility of certain types of evidence; however, because there is no uniform guidance, evidence allowed by one immigration judge may not be allowed by another.[28] Immigration proceedings are considered civil in nature, and constitutional principles of due process apply.[29]

Immigration hearings are typically open to the public, and are normally held in a courtroom, although videoconferencing has been increasingly used in recent years, particularly for respondents being held in detention facilities.[30] The immigration judge may under certain conditions restrict access to the proceeding, such as where the protection of the respondents, witnesses, or the public interest are of concern.[31] Hearings are recorded but are not normally transcribed unless requested or the decision is appealed.[32]

Immigration court proceedings are held in two stages. The first stage, the master calendar hearing, is a preliminary inquiry to ascertain whether a further hearing is required to dispose of factual issues.[33] During this first stage, the immigration judge decides whether an interpreter is needed.[34] The immigration judge also notes for the record whether the respondent is represented by counsel and, if not represented, informs the respondent of his or her right to counsel

25 *See* IMMIGRATION COURT PRACTICE MANUAL, *supra* note 23, § 1.2.

26 In immigration court proceedings, the noncitizen is generally referred to as the respondent. *See* IMMIGRATION COURT PRACTICE MANUAL, *supra* note 23, § 4.3.

27 *See* Won Kidane, *Revisiting the Rules of Procedure and Evidence Applicable in Adversarial Administrative Deportation Proceedings: Lessons from the Department of Labor Rules of Evidence*, 57 CATH. U. L. REV. 93, 117-118 (2007).

28 *Id.* at 118. The admissibility of evidence is particularly important because the immigration judge is not limited to acting as a neutral adjudicator. Rather, the judge may interrogate, examine, and cross-examine the respondent and any witnesses. *Id.* at 123.

29 *Id.* at 119.

30 STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 639 (4th ed. 2005).

31 *Id.* at 640. *See also* 8 C.F.R. §§ 1003.27, 1240.10(b).

32 CHARLES GORDON, STANLEY MAILMAN & STEPHEN YALE-LOEHR, IMMIGRATION LAW & PROCEDURE § 74.05[a] (2009).

33 *Id.*

34 *Id.* § 74.05[b].

(at no expense to the government) and describes the general parameters of evidentiary and court procedure.[35] If the respondent is not represented by counsel, the immigration judge also explains the allegations against the respondent.[36] Thereafter, the respondent or the respondent's counsel answers the charges against him or her, either admitting or denying the factual bases of the charges.[37] At this time, the immigration judge also allows the respondent to designate the country to which he or she would be removed, in the event removal is ordered.[38] The immigration judge also asks the respondent whether relief will be sought, and will inform the respondent of any apparent eligibility to apply for discretionary relief.[39]

In practice, many cases are resolved at the master calendar hearing, if the respondent admits to removability and only seeks voluntary departure. However, if removability is disputed or if relief other than voluntary departure is sought, the proceeding enters the second stage — an individual hearing on the merits, which is usually set for a separate date.[40] At this hearing, the immigration judge makes a decision based on evidence and facts disputed by the respondent and on any other matters deemed relevant. During this phase, the immigration judge makes evidentiary rulings and rules on objections or motions made during the hearing. The judge also may issue subpoenas or order depositions if necessary.[41] The attorney for Immigration and Customs Enforcement ("ICE") presents the agency's case on removability first, followed if necessary by the respondent.[42] ICE may offer into evidence documents, live testimony, or both.[43] Although infrequent, any witness examined on direct by the ICE attorney may be cross-examined by the respondent, after which ICE may re-examine and the respondent may re-cross.[44] The same process occurs in the reverse during the respondent's case-in-chief for relief.[45] If the immigration judge finds the respondent removable, the respondent may apply for and attempt to establish the elements required for one or more forms of relief (e.g., voluntary departure or asylum).[46] After the respondent's presentation of supportive evidence, the ICE attorney has the opportunity to present contrary evidence.[47] At the conclusion of the hearing, the immigration judge issues an order requiring the respondent's removal, or granting relief to the respondent, or making some other disposition of the case.[48]

C. The Hiring, Training, Supervision, and Discipline of Immigration Judges

Immigration judges are career attorneys appointed by the Attorney General as administrative judges within EOIR under Schedule A of the excepted service.[49] As career employees of DOJ, immigration judges are

35 *Id.*

36 *Id.*

37 *Id.*

38 LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY, *supra* note 30, at 640.

39 GORDON ET AL., *supra* note 32, § 74.05[b].

40 *Id.* § 74.05[b].

41 *Id.* § 74.05[a].

42 LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY, *supra* note 30, at 640.

43 *Id.*

44 *Id.* at 640-641.

45 *Id.* at 641.

46 *Id.*

47 *Id.*

48 GORDON ET AL., *supra* note 32, § 74.05[b].

49 8 U.S.C. § 1101(b)(4) (vesting appointment authority for immigration judges in the Attorney General); 5 C.F.R. § 213.3102 (including all attorneys in the executive civil service on Schedule A). *See also* OFFICE OF INSPECTOR GENERAL, U.S. DEP'T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL (July 28, 2008), *available at* http://www.usdoj.gov/oig/special/s0807/final.pdf [hereinafter DOJ POLITICIZED HIRING REPORT]; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-771, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW CASELOAD PERFORMANCE REPORTING NEEDS IMPROVEMENT, at 5 n.6 (2006), *available at* http://www.gao.gov/new.items/d06771.pdf [hereinafter GAO CASELOAD REPORT].

employed for indefinite terms, subject to an initial probationary period of two years.[50] As Schedule A appointees, immigration judges are exempted from many of the laws and regulations governing appointment, evaluation, discipline, and removal of civil service employees.[51]

1. The Hiring of Immigration Judges

Prior to 2004, the Chief Immigration Judge had been given virtual autonomy in hiring immigration judges by the Attorney General. The process required a formal application, a resume, and an oral interview by a judge. In 2004, DOJ changed this process, transferring hiring directly to the Office of the Attorney General. Through this new process, the Attorney General's office solicited candidates and then informed EOIR who should be hired. After considerable controversy over hiring practices, DOJ's Office of Inspector General ("OIG") issued a report concluding that the Attorney General's office had violated federal law prohibiting politicized hiring.[52] During the four-year period when the Attorney General's office controlled the hiring, 31 immigration judges were appointed.

In April 2007, then-Attorney General Gonzales approved a process that returned hiring responsibilities to EOIR. Under the current process, OCIJ reviews applications received in response to public announcements for vacancies and rates each candidate. OCIJ then contacts applicants with the highest ratings to obtain writing samples and references, and three-member EOIR panels interview all top-tier candidates. The panels, which consist of two Deputy Chief Immigration Judges or Assistant Chief Immigration Judges and a Senior EOIR Manager, create packets of materials for each candidate, including the application materials, resumes, interview summaries, reference summaries, and other information. The EOIR Director and the Chief Immigration Judge review those packets and together select at least three candidates to recommend for final consideration for each vacancy. A second three-member panel, including the EOIR Director and a career DOJ Senior Executive Service ("SES") employee and a non-career SES employee, both designated by the Deputy Attorney General, then interviews as many of the three final candidates as they believe necessary. This panel recommends one candidate for the position, and the Attorney General then either approves or denies this recommendation. Either the Deputy Attorney General or the Attorney General can request additional candidates if they do not approve the recommended candidate.[53]

In addition to the procedural changes to the hiring process, the requirements for candidates were strengthened to include "a new quality ranking factor," intended to ensure that applicants demonstrate a capacity for appropriate judicial temperament. Other required qualifications include an LL.B. or J.D. degree; a duly authorized license to practice law as an attorney under the laws of a state, territory, or the District of Columbia; United States citizenship; and a minimum of seven years of relevant post-bar admission legal experience at the time the application is submitted, with one year of experience equivalent to the GS-15 level in the federal service. Candidates also are expected to have experience in at least three of the following areas: knowledge of immigration laws and procedure; substantial litigation experience, preferably in a high-volume context; experience handling complex legal issues; experience conducting administrative hearings; or knowledge of judicial practices and procedures.[54]

---

50 *Oversight of the Department of Justice's Executive Office for Immigration Review: Hearing Before the H. Judiciary Subcomm. on Immigration, Citizenship, Refugees, Border Security and International Law,* 110th Cong. 2 (Sept. 23, 2008) (statement of Kevin Ohlson, Director, EOIR) [hereinafter *Ohlson Testimony*]. During the probationary period, immigration judges can be terminated if they "fail to consistently demonstrate the necessary abilities, professionalism, and temperament on the bench." *See also* Attorney General Reform Measures, *supra* note 6, at 1.

51 *See, e.g.*, 5 C.F.R. § 6.4 (exempting Schedule A positions from the Civil Service Rules and Regulations regarding removals unless otherwise required by statute). *See also* GAO Caseload Report, *supra* note 49, at 7 n.14 (noting that immigration judges have been excluded from the performance appraisal system requirements by the Office of Personnel Management pursuant to 5 C.F.R. § 430.202(c)).

52 DOJ Politicized Hiring Report, *supra* note 49.

53 *Id.* at 114.

54 *See* Immigration Judge Job Announcement number EOIR-10-0078, http://jobsearch.usajobs.gov (last visited Jan. 31, 2010). *See also* GAO Report to Congressional Requesters, U.S. Asylum System: Significant Variation Existed in Asylum Outcomes Across Immigration Courts and Judges (Sept. 2008), at 17 [hereinafter GAO Report on Variation].

2. Professional Development and Training Resources

Since 1997, newly hired immigration judges have been required to participate in an initial weeklong training program at the National Judicial College ("NJC") and two weeks of in-house training.[55] The NJC training includes courses on immigration court procedure, substantive immigration law, ethics, caseload management, and stress management.

As a result of the Attorney General's 2006 reforms, the training for new immigration judges has been extended from three weeks to a total of five weeks, and, according to former EOIR Director Kevin Ohlson, includes "an extensive academic curriculum covering relevant legal and procedural topics, as well as on-the-job training where new Immigration Judges observe, and are observed by, mentor judges."[56] The observation period now includes two weeks of observations in the immigration judge's home immigration court and two weeks of observations and hearings in another immigration court. The mentoring relationship is supposed to continue throughout the immigration judge's two-year probationary period.[57]

Among other changes implemented since 2006, EOIR has indicated that it now offers continuing education opportunities on topics such as asylum and country conditions for all immigration judges and legal staff on a regular basis.[58] In August 2008, all immigration judges participated in a two-day training program on asylum and other relevant topics, and EOIR is planning a similar session on international religious freedom.[59]

For many years, EOIR has also convened annual training conferences for newly hired and veteran immigration judges. These conferences included lectures and presentations on topics such as immigration law and procedure, ethics, religious freedom, disparities in asylum adjudications, and forensic analysis. Due to budget constraints, however, the in-person conferences were not held in 2004, 2005, or 2008. EOIR offered a recorded presentation in its place during those years.[60]

According to former EOIR Director Kevin Ohlson, EOIR makes a number of legal reference resources available to immigration judges.[61] For instance, EOIR recently produced its Immigration Judge Benchbook, which contains reference materials on immigration law topics, including sample decisions and forms. EOIR also expanded its online Virtual Law Library, which includes immigration decisions and other resources. In January 2007, EOIR began distributing a monthly newsletter on developments in immigration law. Finally, EOIR has been developing an Ethics Manual designed to give detailed guidance to immigration judges and members of the Board of Immigration Appeals on ethical issues.

Since April 2008, all newly hired immigration judges have been required, after training, to pass an examination testing their familiarity with basic principles of immigration law before they begin adjudicating matters.[62] Each new judge must also complete a set of mock-hearing and oral decision exercises before beginning to hear cases.[63]

---

55 The National Judicial College, located in Reno, Nevada, is a non-profit organization which offers judicial training and education. *See* The National Judicial College, http://www.judges.org (last visited Nov. 3, 2009). Due to recent budget constraints, the classroom training normally conducted at the NJC has been handled internally at the immigration courts. *See* TRAC, Immigration Report, Immigration Courts: Still a Troubled Institution, June 30, 2009, http://trac.syr.edu/immigration/reports/210/ (last visited Nov. 3, 2009) [hereinafter Troubled Institution] (citing public remarks of former BIA Chairman Juan Osuna).

56 *Ohlson Testimony*, *supra* note 50, at 2.

57 GAO Report on Variation, *supra* note 54, at 18.

58 *Ohlson Testimony*, *supra* note 50, at 2.

59 *Id*. at 3.

60 GAO Report on Variation, *supra* note 54, at 18.

61 *Ohlson Testimony*, *supra* note 50, at 3.

62 EOIR Progress Overview, *supra* note 7.

63 GAO Report on Variation, *supra* note 54, at 18.

3. Supervision, Performance, and Discipline of Immigration Judges

As Schedule A employees, immigration judges are exempted from the performance appraisal requirement applied to other civil service employees.[64] Unlike ALJs, however, immigration judges are not well insulated from other forms of performance review or adverse action by their home agency.[65] Perhaps because of the unusual position that immigration judges occupy in comparison to ALJs in other agencies and other career attorneys in DOJ, the processes for supervision, performance evaluation, discipline, and removal of immigration judges have never been clearly set out and applied over the history of EOIR.

The following discussion describes the forms of supervision and review currently in place, including caseload management, supervision by ACIJs, codes of ethics and conduct applicable to immigration judges, and methods of disciplining immigration judges.

a. Caseload Management

From 1988 to 1997, OCIJ operated the Field Office Case Management Review Program as part of its oversight of the operations and performance of the immigration courts.[66] This program focused on examining the records of proceedings to assure compliance with case management procedures.[67] In July 1997, the CIJ determined that this program was insufficient in scope to fulfill his oversight responsibilities adequately, and a new program, the Immigration Court Evaluation Program ("ICEP"), was instituted in its place.[68] ICEP is a peer evaluation program in which teams consisting of immigration judges, court administrators, court interpreters, and legal technicians evaluate individual immigration court performance on case management and processing, database management, security, external relations, and administrative operations.[69] Each immigration court is typically evaluated once every four years.[70]

In addition, OCIJ monitors and analyzes the caseloads of individual immigration courts and immigration judges.[71] In connection with this process, EOIR and OCIJ have established target time frames and case completion goals for each of eleven types of cases.[72] For example, the case completion goal for asylum cases is 90% of cases completed within 180 days.[73] For noncitizens with claims for relief other than asylum, the goal is 90% of cases completed within 120 days for detained noncitizens, and 60% of cases within 240 days if not detained.[74]

EOIR and OCIJ have indicated that they use the data gathered to allocate the caseload and available resources more efficiently, to identify areas needing improvement, and to support requests for additional resources.[75] The case completion goals are considered "aspirational" and have not been used to officially evaluate the performance of individual immigration

64 *See* GAO Caseload Report, *supra* note 49, at 7 n.14 (noting that immigration judges have been excluded from the performance appraisal system requirements by the Office of Personnel Management pursuant to 5 C.F.R. § 430.202(c)); *H. Comm. on Gov't Reform, Pay and Benefits Status for Non-Article III Judges, Subcomm. on Federal Workforce and Agency Organization*, 109th Cong. 50-51 (2006) (statement of Denise Slavin, National Association of Immigration Judges) (noting performance review exemption is in recognition of the "quasi-judicial nature of the job").

65 Administrative law judges are exempted by statute from all performance appraisal systems, and in most instances, an agency only can take adverse action against an administrative law judge upon a finding of good cause by the Merit Systems Protection Board. *See* 5 U.S.C. §§ 2301(2), 7251.

66 GAO Caseload Report, *supra* note 49, at 24 n.36.

67 Office of the Chief Immigration Judge, EOIR, U.S. Dep't of Justice, Operating Policies and Procedures Memorandum No. 01-01: Immigration Court Evaluation Program (2001), at 2, *available at* http://www.usdoj.gov/eoir/efoia/ocij/oppm01/OPPM01-01.pdf [hereinafter OPPM 01-01].

68 GAO Caseload Report, *supra* note 49, at 24 n.36.

69 OPPM 01-01, *supra* note 67, at 2-3.

70 GAO Caseload Report, *supra* note 49, at 25.

71 *Id.* at 16-17.

72 *Id.* at 20-22. Some of these time frames are established by law. *See, e.g.*, 8 U.S.C. § 1158(d)(5)(a)(iii) (requiring that final administrative adjudication of affirmative asylum applications shall be completed within 180 days of filing).

73 GAO Caseload Report, *supra* note 49, at 21-22.

74 *Id.*

75 *Id.* at 18-19.

judges.[76] Individual immigration judges, however, have indicated that pressure from EOIR management to meet case completion goals is substantial.[77]

b. Supervision and Performance Reviews

The Chief Immigration Judge is "responsible for the supervision, direction, and scheduling of the immigration judges in the conduct of the hearings and duties assigned to them."[78] As of December 2009, ten Assistant Chief Immigration Judges support the CIJ and serve as the principal liaisons between OCIJ headquarters and the immigration courts.[79] The ACIJs have supervisory authority over immigration judges, court administrators, and judicial law clerks.

In its report on asylum grant rate disparities, the Government Accountability Office ("GAO") noted that EOIR "generically states that the role of the ACIJ is to manage and coordinate immigration judges and supervise the administrative operations of the adjudications program," and concluded that, aside from some "brief and general reference[s] to supervision" in the written performance appraisal standards for ACIJs, "[m]ore detailed guidance did not exist regarding how ACIJs are to carry out their supervisory role."[80] GAO ultimately recommended that EOIR "develop a plan for supervisory immigration judges, to include assessment of the resources and guidance needed to ensure that immigration judges receive more effective supervision."[81] In response, EOIR provided a list of duties and tasks to be performed by ACIJs and a list of skill and knowledge necessary to perform such duties.[82]

As part of the Attorney General's reform measures, a pilot program was begun in 2006 that deployed some ACIJs onsite to the regional courts to enhance the supervision of immigration judges, as well as to improve access to EOIR management by practitioners and DHS.[83] Previously, the ACIJs were all based out of OCIJ headquarters in Falls Church, Virginia. As of December 2009, five of the ten ACIJs were deployed to regional courts and five were serving at OCIJ headquarters.[84]

The AG's proposed reform measures also included implementation of performance reviews for immigration judges, including special monitoring and review during the two-year probationary period for newly hired judges.[85] DOJ has taken the position that immigration judges are "adjudicatory employees" for whom a civil service performance review model would be most appropriate.[86] EOIR reported that it has completed negotiations with the National Association of Immigration Judges ("NAIJ"), the recognized collective bargaining unit for immigration judges, regarding such reviews, and that the performance reviews were scheduled to be implemented beginning July 1, 2009.[87] EOIR has not provided additional detail

---

76 EOIR, AILA-EOIR Liaison Agenda Questions and Answers for March 22, 2006, at 14, *available at* http://www.justice.gov/eoir/statspub/eoiraila032206.pdf. Although specific details are not yet available, it is likely that case completion goals play a role in the recently announced performance evaluations of immigration judges. *See* TROUBLED INSTITUTION, *supra* note 55 (reporting that "Accountability for Organizational Results" is an area subject to evaluation).

77 *See* Stuart L. Lustig et al., *Inside the Judges' Chambers: Narrative Responses from the National Association of Immigration Judges Stress and Burnout Survey*, 23 GEO. IMMIGR. L.J. 57 (2008); Stuart L. Lustig et al., *Burnout and Stress Among United States Immigration Judges*, 13 BENDER'S IMMIGR. BULL. 22, 29-30 (2008); *see also* Section III.A.1, *infra.*

78 8 C.F.R. § 1003.9(b).

79 OCIJ Biographies, *supra* note 11; *see also* GAO CASELOAD REPORT, *supra* note 49, at 7.

80 GAO REPORT ON VARIATION, *supra* note 54, at 45.

81 *Id.* at 62.

82 *See* EOIR, CORRECTIVE ACTION PLAN (2009), *available at* http://trac.syr.edu/immigration/reports/210/include/09-ACIJs_EOIR_report_to_GAO_2009.pdf. TRAC noted, however, that EOIR's report did not make "clear whether EOIR has taken steps to address the concerns cited in the GAO analysis." *See* TROUBLED INSTITUTION, *supra* note 55.

83 *See* ATTORNEY GENERAL REFORM MEASURES, *supra* note 6, at 1.

84 *See* OCIJ Biographies, *supra* note 11; EOIR, ACIJ Assignments – December 2009, http://www.justice.gov/eoir/sibpages/ACIJAssignments.htm (last visited Jan. 31, 2010).

85 *See* ATTORNEY GENERAL REFORM MEASURES, *supra* note 6, at 1.

86 *See* Letter from the National Association of Immigration Judges to David Margolis, Associate Deputy Attorney General (Oct. 21, 2008), at 2 [hereinafter NAIJ Letter to Margolis] (on file with the American Bar Association Commission on Immigration).

87 *See* EOIR, Measures to Improve the Immigration Courts and the Board of Immigration Appeals (May 2009), at 1, *available at* http://trac.syr.edu/immigration/reports/210/include/EOIR_Report_to_Congress_0905.pdf [hereinafter EOIR Progress Update].

as to the scope of review other than to note that "Legal Ability, Professionalism, and Accountability for Organizational Results" will be evaluated.[88]

c. Ethics and Conduct of Immigration Judges

Immigration judges are subject to a number of different codes of conduct and ethics. As executive branch employees, they are covered by the Standards of Ethical Conduct of Employees of the Executive Branch.[89] As DOJ attorneys, they are subject to DOJ's Codes of Conduct and DOJ management policies.[90] As employees within EOIR, they are subject to the EOIR Ethics Manual and EOIR management policies.[91] As an attorney, each immigration judge is subject to the rules of professional conduct in the state(s) where he or she is admitted to the bar and performs his or her duties.[92] In 2007, DOJ proposed "Codes of Conduct for the Immigration Judges and Board Members" ("Codes of Conduct"), and these are currently being revised and incorporated into the existing Ethics Manual.[93]

d. Complaints and Discipline

Although EOIR and OCIJ have been monitoring administrative aspects of the immigration courts since at least the late 1980s, formal monitoring of complaints brought against immigration judges by noncitizens, the private bar, DHS trial attorneys, other immigration judges, and others began only in October 2003.[94] Complaints are generally made to the ACIJ with supervisory responsibility over the immigration judge in question, and the ACIJ communicates complaints orally or in writing to OCIJ management.[95]

As part of the Attorney General's reform measures, in February 2006, EOIR created a specialized position, the Assistant Chief Immigration Judge for Conduct and Professionalism, to review and monitor all complaints and allegations of misconduct involving immigration judges.[96] EOIR also has begun to revamp its complaint procedures, launching a website link for the public to file complaints, adding additional training for ACIJs on handling conduct issues, and coordinating with DOJ's Office of Professional Responsibility ("OPR") and DOJ's Office of Inspector General ("OIG").[97]

OCIJ is required to inform the EOIR Director immediately of all complaints filed against immigration judges, even if OCIJ has not had an opportunity to verify the accuracy of a complaint.[98] Complaint reports are compiled monthly for internal use only.[99] If EOIR determines that a complaint requires additional consideration, it may be referred to OPR or, if criminal or serious administrative misconduct is involved, to OIG.[100]

According to a recent GAO report, the disciplinary measures used in response to substantiated complaints include counseling, oral and written reprimands, and

---

88 *See* TROUBLED INSTITUTION, *supra* note 55.

89 *See* 5 C.F.R. pts. 2635, 3801.

90 *See* 5 C.F.R. pt. 3801; *see also* 28 C.F.R. § 45.1.

91 *See* U.S. Dep't of Justice, Ethics Manual for Members of the Board of Immigration Appeals, Immigration Judges, and Administrative Law Judges Employed by the Executive Office for Immigration Review (Apr. 2001), *available at* http://www.usdoj.gov/eoir/statspub/handbook.pdf. The EOIR Ethics Manual was originally prepared in 2001 as a guide for members of the BIA, immigration judges, and administrative law judges employed by EOIR. The manual itself largely summarizes the other laws, regulations and codes of conduct and ethics applicable to EOIR adjudicators, but also provides commentary and discussion. The EOIR Ethics Manual makes frequent reference to the ABA Model Code of Judicial Conduct, but notes that the Model Code is not binding on immigration judges. Rather it represents "aspirational goals."

92 *See* Codes of Conduct for the Immigration Judges and Board Members, 72 Fed. Reg. 35,510-13 (June 28, 2007) [hereinafter Proposed Codes of Conduct].

93 *Id.*; *see also* EOIR Progress Overview, *supra* note 7. EOIR has reported that a revised Ethics Manual was provided to NAIJ for comment in March 2009, but as of February 2010, the revised Ethics Manual had not been posted to EOIR's website. *See* EOIR Progress Update, *supra* note 87, at 6 ("The revised *Ethics Manual* was provided to the NAIJ on March 10, 2009, requesting any proposals the union wishes to submit by April 10, 2009.").

94 GAO CASELOAD REPORT, *supra* note 49, at 27.

95 *Id.* at 27-28.

96 *Ohlson Testimony*, *supra* note 50, at 2; *see also* EOIR Progress Overview, *supra* note 7, at 5.

97 *See* EOIR Progress Overview, *supra* note 7, at 4.

98 GAO CASELOAD REPORT, *supra* note 49, at 28.

99 *Id.* at 27.

100 *Id.* at 28.

suspension.[101] The AG also has the authority to reassign or remove immigration judges.[102] Although some general data regarding disciplinary measures have been published,[103] the results of disciplinary processes are not otherwise disseminated publicly.[104]

4. Tenure, Retention, and Removal of Immigration Judges

As noted above, immigration judges are Schedule A civil service employees in the excepted service with no fixed term of employment and little protection against removal. Immigration judges are "subject to such supervision . . . as the Attorney General shall prescribe."[105] Therefore, they can be removed from the bench for disciplinary violations, other conduct issues, or for non-disciplinary reasons, either by reassignment within DOJ or outright termination, at the discretion of the Attorney General.[106] Immigration judges may, however, appeal certain adverse actions to the Merit Systems Protection Board.[107]

In practice, immigration judges are rarely removed from the bench for conduct or other issues.[108] The limited information available on the results of disciplinary processes at EOIR indicates that removal is a rarely-used sanction.[109] In addition, it appears that the Attorney General has rarely exercised removal discretion with respect to immigration judges.[110]

The average tenure of active immigration judges, as of 2007, was approximately eleven to twelve years.[111] Since 2003, the annual attrition rate has averaged approximately 5%, with the majority of departures due to retirement.[112]

III. Issues Relating to Immigration Judges and Immigration Courts

Through our background research and interviews, we have identified a number of concerns with the system of immigration judges and immigration courts. Some concerns identified in the literature and by interviewees are system-wide, the solutions to which may require broad systemic changes. For example, recent studies analyzing rates at which immigration judges grant asylum have revealed striking disparities among the immigration judges.[113] In three of the largest immigration courts, more than 25% of the judges were found to have grant rates that deviate from their own court's mean grant rate by more than 50%.[114]

---

101 *Id.*

102 *See* Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54, 893 (Aug. 26, 2002) (codified at 8 C.F.R. pt. 3) ("All attorneys in the Department are excepted employees, subject to removal by the Attorney General, and may be transferred from and to assignments as necessary to fulfill the Department's mission."); *see also* Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 373-75 (2006) (discussing Attorney General's authority over immigration judges).

103 GAO CASELOAD REPORT, *supra* note 49, at 28-29 ("OCIJ received 129 complaints against immigration judges during the fiscal years 2001 through 2005. As of September 30, 2005, OCIJ had taken action on 121 of these . . . about 25 percent were found to have no merit, about 25 percent resulted in disciplinary actions . . . about 22 percent were referred to [OPR or OIG], and the remaining 28 percent resulted in various other [non-disciplinary] actions.").

104 *See* TROUBLED INSTITUTION, *supra* note 55 (reporting that EOIR was not able to provide any information regarding the disposition of complaints). One observer has described the process as "shrouded in secrecy." John Roemer, *Jurist's Asylum Seeker Rulings Earn Rebuke*, L.A. DAILY J., Jan. 31, 2006, at 1.

105 8 U.S.C. § 1101(b)(4).

106 *See* Legomsky, *Deportation and the War on Independence*, *supra* note 102, at 373-75.

107 *See, e.g.*, Levinsky v. Dep't of Justice, 99 M.S.P.R. 574 (2005) (appeal of removal of immigration judge).

108 Stacy Caplow, *ReNorming Immigration Court*, 13 NEXUS 85, 98 (2007-08). According to data obtained from EOIR, only two immigration judges have been terminated or removed since 2003. TRAC BACKLOG REPORT, *supra* note 21, Fig. 4 supporting data.

109 *See* GAO CASELOAD REPORT, *supra* note 49, at 28-29.

110 It should be noted, however, that the oft-discussed "purge" of the BIA was accomplished by non-disciplinary reassignment of BIA members by the Attorney General. Legomsky, *Deportation and the War on Independence*, *supra* note 102, at 375-379.

111 Estimate based on data available at http://www.trac.syr.edu/immigration.

112 TRAC BACKLOG REPORT, *supra* note 21, Fig. 4. Burnout and job-related stress may be a significant factor in turnover. *See* Lustig et al., *Inside the Judges' Chambers*, *supra* note 77, at 77; *see also* Section III.A.1, *infra*.

113 Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 373 (2007). For an expanded version of *Refugee Roulette*, with commentary by scholars from Canada and the United Kingdom as well as from the United States, please see JAYA RAMJI-NOGALES, ANDREW I. SCHOENHOLTZ, & PHILIP G. SCHRAG, REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM (NYU Press 2009).

114 *Id*.

Significant disparities exist even when the study focused on decisions pertaining to nationals of one country.[115]

Analysis of decisions taking into account immigration judges' biographical data indicates other disparities as well. Female judges grant asylum at a rate 44% higher than that of their male colleagues, and immigration judges who have prior experience working for ICE or its predecessor, the Immigration and Naturalization Service, grant asylum at a significantly lower rate than those immigration judges with experience practicing immigration law in a private firm, at a nonprofit organization or working in academia.[116] Moreover, the length of experience of the immigration judge had a statistically significant impact on the likelihood that asylum would be granted, with longer tenured judges more likely to grant asylum.[117]

Another broad concern voiced by observers is a lack of trust in and respect for the immigration courts — among the immigration bar, legal scholars, the press and even court of appeals judges — resulting in part from their lack of independence from DOJ.[118] The widely-publicized politicization of the hiring of immigration judges and other DOJ employees between 2004 and 2007, and the allegedly politically-motivated "purge" of the Board of Immigration Appeals discussed in Part 3 of this Report, have exacerbated this problem.[119] Although a number of reforms have been implemented since then, it is yet unclear to what degree such reforms will improve confidence in the integrity of the immigration courts.

Underlying and in addition to these broad systemic concerns are a number of more specific concerns which are described more fully below in this Section.

A. Immigration Judges

1. Large Caseloads and Inadequate Staffing

Numerous stakeholders and commentators have recognized what IJs also know: that EOIR is underfunded and that this resource deficiency has resulted in too few judges and insufficient support staff to competently handle the caseload of the immigration courts.[120] For example, in FY 2008, immigration judges completed 281,041 proceedings, and of those, 229,316 resulted in the judges issuing decisions.[121] The other 51,725 completions of proceedings included administrative closures, transfers, and changes of venue.[122] With 226 immigration judges,[123] these numbers translate into an average of 1,243 proceedings completed and 1,014 decisions issued per judge. To keep pace with these numbers, each immigration judge would need to issue at least 19 decisions each week, or approximately four decisions per weekday.[124] A recent report by Syracuse University's TRAC Clearinghouse demonstrated that the average time

115 *Id.*

116 *Id*. at 376-77.

117 *See* GAO Report on Variation, *supra* note 54, at 22-23. In affirmative asylum cases, judges with less than three years of experience granted asylum in 28.9% of cases, while judges with between three and ten years of experience and more than ten years of experience granted asylum in 40.7% and 39.2% of cases, respectively. *Id. at 120.* In defensive asylum cases, judges with less than three years of experience granted asylum in 20.4% of cases, while judges with between three and ten years of experience and more than ten years of experience granted asylum in 26.8% and 29.6% of cases, respectively. *Id. at 121.*

118 *See, e.g.*, TRAC, Immigration Report, Judges Show Disparities in Denying Asylum, http://trac.syr.edu/immigration/reports/160/ (last visited Nov. 3, 2009) [hereinafter TRAC Disparities Report] (noting that practitioners, federal appeals court judges, organizations representing noncitizens, and others have for many years complained about numerous occasions when the immigration judges have failed to achieve fair, expeditious, and uniform application of the nation's immigration laws).

119 *See* Part 3: Board of Immigration Appeals, *infra*.

120 *See, e.g.*, Human Rights First, How to Repair the U.S. Asylum System: Blueprint for the Next Administration (2008) *available at* http://www.humanrightsfirst.org/pdf/081204-ASY-asylum-blueprint.pdf [hereinafter, Human Rights First Blueprint]; Lustig et al., *Burnout and Stress, supra* note 77, at 29-30; Ramji-Nogales et al., *supra* note 113, at 393; *Oversight Hearing on the Executive Office for Immigration Review: Hearing before the H. Comm. on the Judiciary Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law*, 110th Cong. 9 (Sept. 23, 2008) (written testimony of Stephen H. Legomsky, John S. Lehmann University Professor, Washington University School of Law) [hereinafter *Legomsky Testimony*].

121 *See* EOIR FY 2008 Statistical Year Book, *supra* note 1, at D1.

122 *Id*.

123 This represents the number of immigration judges (including ACIJs) as of July 2, 2008. *See* TRAC Backlog Report, *supra* note 21, Fig. 3 supporting table.

124 Indeed, these numbers represent an underestimate of how many decisions immigration judges would need to decide on a weekly and daily basis, since it does not factor in vacation time, sick leave, holidays or time spent for calendaring administrative or other duties.

immigration judges have available to dispose of cases is at its lowest point in more than a decade.[125]

The shortage of judges is accompanied by a shortage of law clerks to assist them. Law clerks are usually hired for one- to two-year terms and are typically recent law school graduates hired through the Attorney General's Honors Program. As of November 2009, there were 62 law clerks, or roughly one clerk for every 3.7 immigration judges.[126] Because some immigration courts are staffed by a single immigration judge, there are a number of courts with no assigned law clerks.[127]

By way of comparison, in 2007 there were roughly 2,075 full time law clerks assisting the 678 federal district judges, or approximately three clerks per judge.[128] District judges are also assisted by more than 500 magistrate judges.[129] Immigration judges do not have the benefit of such judicial adjuncts to help manage their caseloads.

Many observers have noted that the relatively low ratio of law clerks to immigration judges continues to be a concern.[130] Although the number of law clerks has increased from approximately 35 in 2006 to 62, this increase is still short of the 40 additional clerks for whom EOIR requested funding in 2006.

The heavy caseloads and shortage of law clerk support, among other factors, have exacted a toll on the health and satisfaction of immigration judges. In August 2008, a group of researchers published the results of a survey of immigration judges that used standard measures of stress and burnout (the Secondary Traumatic Stress Scale and the Copenhagen Burnout Inventory).[131] The participants reported significant levels of stress and higher levels of burnout than any other professional group to whom the Copenhagen Burnout Inventory has been administered, including physicians in busy hospitals and prison wardens.[132] The study reported a "pandemic" of comments from immigration judges citing their heavy caseloads and lack of time to research the law and country conditions as significant sources of their stress and burnout.[133] The respondents also pointed to inadequate support — particularly from law clerks — as a significant concern.[134] The study did not correlate the immigration judges' stress and burnout levels with results in the courtroom, but clearly, the heavy caseloads and high levels of stress are significant problems.

Despite budget increases for new judge positions in 2006 and 2007 and continuing efforts by EOIR to request additional funding and fill current vacancies as quickly as possible,[135] the total number of active immigration judges was lower in 2008 than it was in 2006.[136] Although EOIR requested additional funds for more immigration judges in 2008, Congress did not appropriate the funds. Congress did, however, approve funding to make 20 temporary immigration judge

---

125 TRAC Backlog Report, *supra* note 21.

126 Interview with EOIR, Nov. 2009.

127 TRAC, Immigration Report, Improving the Immigration Courts: Efforts to Hire More Judges Falls Short, http://trac.syr.edu/immigration/reports/189/ (last visited Nov. 3, 2009) [hereinafter TRAC Hiring Report] (as of July 2008, at least 14 courts were without a law clerk).

128 *See* U.S. Courts, *2007 Facts and Figures*, Table 1.1, *available at* http://www.uscourts.gov/judicialfactsfigures/2007/Table101.pdf.

129 Magistrate Judgeships, Federal Judicial Center, http://www.fjc.gov/history/home.nsf/ (last visited Nov. 3, 2009) (reporting that as of March 2009 there were 517 full-time and 42 part-time authorized magistrate judgeships).

130 *See, e.g.*, Human Rights First Blueprint, *supra* note 120, at 9; Ramji-Nogales et al., *supra* note 113, at 383; Lustig et al., *Inside the Judges' Chambers*, *supra* note 77, at 68-69 (reporting that many judges responding to the survey noted the need for increased support staff — particularly law clerks); s*ee also* AILA Draft Immigration Agency Legislation, § 101(c)(2)(D), as provided to the American Bar Association Commission on Immigration on February 23, 2009 [hereinafter AILA Draft Legislation].

131 Lustig et al., *Burnout and Stress, supra* note 77.

132 *Id.* at 22.

133 *Id.* at 29.

134 *Id*.

135 *See* Attorney General Reform Measures, *supra* note 6, at 6.

136 TRAC, Immigration Report, Bush Administration Plans to Improve Immigration Courts Lags, http://trac.syr.edu/immigration/reports/194/ (last visited Nov. 3, 2009) [hereinafter TRAC Progress Review]. Only with the swearing in of 10 new immigration judges in April 2009 did the number of active judges exceed the number in 2006. TRAC Backlog Report, *supra* note 21.

positions permanent. EOIR did not request additional funding for more immigration judge positions in FY 2009,[137] but requested 28 additional positions for FY 2010.[138]

In March 2007, Kevin D. Rooney, then the director of EOIR, announced that the administration had sought budget increases which, if approved by Congress, would add 240 new positions to EOIR during the next two years, including 40 immigration judges, 40 judicial law clerks, and 20 Board staff attorneys.[139] Because Congress did not appropriate funding for new positions requested in FY 2008 and EOIR did not request additional funding for FY 2009, no new immigration judge positions were funded until the FY 2010 budget.[140]

Some commentators have remarked on the lengthy delays in filling immigration judge positions that *are* available, attributing the delays at least in part to the fallout from the improper politicized hiring between 2004 and 2006.[141] DOJ's Office of the Inspector General released a report on July 28, 2008 on the illegal hiring which noted: "One of the results of this tightly controlled selection process [by DOJ political appointees] was that it left numerous immigration judge vacancies unfilled for long periods of time . . . ."[142] The report also noted that a hiring freeze went into effect in January 2007 after DOJ Civil Division attorneys investigated the immigration hiring process and lasted until a new process was implemented in April 2007.[143] The Director of EOIR stated in July 2008 that the new process was working efficiently, but that part of the delay in filling positions was due to a new requirement that background investigations be completed before immigration judges can be appointed.[144] As of June 2009, EOIR reported that 19 positions remained unfilled.[145]

2. Issues with the Selection of Immigration Judges

a. Inadequate Standards and Lack of Public Input

Some commentators have opined that the standards for appointing immigration judges are either too lax or focus on the wrong areas. For instance, Stacy Caplow, a professor of law and Director of Clinical Education at Brooklyn Law School, noted that the list of criteria for hiring immigration judges is missing many of the traditional criteria associated with judicial selection.[146] Further, Professor Caplow noted that the hiring process does not account for "factors such as character, demeanor, experience with and sensitivity about cross-cultural communications, experience or training in interacting with victims of abuse or torture, or expertise in historical, political, or current events."[147]

As discussed in Section II.C.1, *supra*, EOIR has strengthened hiring criteria for immigration judge candidates. Some commentators, however, believe that the criteria still do not adequately consider certain aspects of a candidate's aptitude for the position. For instance, although the "new quality ranking factor" is designed to examine a candidate's temperament, there are no specific requirements concerning a candidate's demonstrated sensitivity to cultural differences, an ability to treat all persons with respect, or a predisposition to being cautious about judging credibility of people who claim to be victims of torture or trauma.[148]

Finally, some have expressed concerns that, unlike the process for appointing other judicial officials, there is no opportunity for public input on immigration

137 *Id.*

138 EOIR Improvements Update, *supra* note 7, at 4.

139 TRAC Hiring Report, *supra* note 127.

140 TRAC Progress Review, *supra* note 136.

141 GAO Report on Variation, *supra* note 54, at 4-5.

142 DOJ Politicized Hiring Report, *supra* note 49, at 116.

143 *Id.* at 112-14.

144 *Id.* at 115.

145 EOIR Improvements Update, *supra* note 7, at 4.

146 Stacy Caplow, *A New Year and the Old Debate: Has Immigration Reform Reformed Anything?*, 13 Nexus 85, 97 (2007-2008).

147 *Id.* at 98.

148 *Id.* at 97.

judge candidates, and there is no judicial evaluation process to permit input from the profession such as might occur at a bar association or similar organization to evaluate the fitness of candidates for judicial office.[149]

b. Lack of Diversity Among Immigration Judges

Historically, many immigration judges have been recruited and hired from the ranks of government attorneys with experience working for either ICE (or its predecessor, INS) or DOJ. Some commentators have noted that when a majority of immigration judges possess similar background and experience, the result may be a body of decision makers with similar perspectives and a lack of system-wide neutrality.[150] In fact, a recent study of disparities in immigration adjudication found that an immigration judge's prior work experience had a statistically significant impact on his or her rate of granting asylum. For example, immigration judges with backgrounds in civilian government (excluding INS and ICE) or the military had lower grant rates than those without government or military experience, respectively, and immigration judges with experience with INS or ICE specifically had lower grant rates than those without such experience.[151] Aside from the issue of grant rate disparities generally, this discrepancy between immigration judges with and without prior government experience could undermine the appearance of neutrality of the immigration courts.

c. Bias and Lack of Proper Temperament

According to one report, immigration lawyers practicing in immigration courts believe that bias and incompetence among immigration judges is widespread.[152] In a 2005 decision, Judge Posner of the U.S. Court of Appeals for the Seventh Circuit noted that there were problems with immigration judges demonstrating improper temperament and inappropriate behavior in the courtroom.[153] Judge Posner raised concerns about the quality of adjudication and temperament of immigration judges, and provided a list of cases demonstrating these problems.[154] No doubt, the large caseloads, lack of adequate staffing, and relatively short time in which immigration judges must adjudicate cases exacerbate problems of inappropriate behavior.

Problems with lack of judicial temperament affect not only the process experienced by noncitizens, but also the results of their cases. In their substantive judgments about credibility and other matters, certain judges have exhibited xenophobia and prejudice, a lack of professionalism and cultural sensitivity, and ignorance of country conditions.[155]

3. Insufficient Training and Professional Development

Although EOIR recently instituted improvements to the training program for immigration judges, some stakeholders have raised concerns about the focus of current training programs. In particular, some believe that training should aim to ensure that immigration

149 *See, e.g., id.*

150 *See, e.g.*, Caplow, *supra* note 146, at 97 ("A bench packed with career government lawyers is not truly neutral.").

151 *See* Ramji-Nogales et al., *supra* note 113, at 345. Similarly, a GAO study reported that immigration judges with prior government immigration experience were statistically significantly less likely than judges without prior government immigration experience to grant asylum claims in affirmative cases. GAO Report on Variation, *supra* note 54, at 120. The difference in grant rates in defensive cases, however, was not statistically significant. *Id.* at 121.

152 Michele Benedetto, *Crisis on the Immigration Bench: An Ethical Perspective*, 73 Brook. L. Rev. 467, 493 (2008).

153 Benslimane v. Gonzales, 430 F.3d 828, 829 (7th Cir. 2005).

154 *Id.* Judge Posner listed the following cases, among others, rebuking the conduct of immigration judges: Dawoud v. Gonzales, 424 F.3d 608, 610 (7th Cir. 2005) ("The IJ's opinion is riddled with inappropriate and extraneous comments."); Wang v. Att'y Gen., 423 F.3d 260, 269 (3d Cir. 2005) ("The tone, the tenor, the disparagement, and the sarcasm of the IJ seem more appropriate to a court television show than a federal court proceeding."); Fiadjoe v. Att'y Gen., 411 F.3d 135, 154-55 (3d Cir. 2005) (noting that the immigration judge's "hostile" and "extraordinarily abusive" conduct toward petitioner "by itself would require a rejection of his credibility finding").

155 *See, e.g.*, Rexha v. Gonzales, 165 Fed. Appx. 413, 418 n.3 (6th Cir. 2006) ("[H]orror stories persist of nasty, arrogant, and condescending immigration courts."); Sukwanputra v. Gonzales, 434 F.3d 627, 637-38 (3d Cir. 2006) (objecting to the immigration judge's "intemperate and bias-laden remarks . . . none of which had any basis in the facts introduced, or the arguments made, at the hearing"); Cham v. Att'y Gen., 445 F.3d 683, 691 (3d Cir. 2006) (the immigration judge "continually abused an increasingly distraught petitioner, rendering him unable to coherently respond to [the judge's] questions. This, of course, enabled [the judge] to then conclude that [the respondent's] testimony was 'totally incredible' because of inconsistencies and because his demeanor was that of 'an individual not telling the truth'").

judges understand that one of their obligations is to avoid deporting a refugee in violation of the 1951 Refugee Convention and its 1967 Protocol.[156] Others recommend that the training programs devote more time and resources to training immigration judges on ethics and temperament, cultural sensitivity and awareness, how to make appropriate credibility determinations, how to effectively identify fraud, changing country conditions, and new developments in immigration law.[157]

Commentators have also expressed the view that EOIR provides immigration judges insufficient opportunities to meet with other immigration judges in person, whether formally or informally. Immigration judges have expressed an overwhelming preference for live, in-person training over teleconferencing, videoconferencing, or pre-recorded sessions.[158] A large majority of immigration judges reported that informal meetings with other immigration judges would improve their ability to do their jobs effectively.[159] The recent study on burnout and stress among immigration judges reported that many find their work very isolating and believe they would benefit from more regular contact with other immigration judges.[160]

Another concern expressed by immigration judges and other stakeholders is that the current caseloads and case completion goals[161] limit the ability of immigration judges to take advantage of available training and professional development opportunities. Immigration judges are currently provided very limited administrative time off the bench, and many report using all or nearly all of their allocated administrative time to hear cases.[162] Some immigration judges have reported that they lack enough time even to have lunch with their colleagues.[163] Without adequate time in immigration judges' schedules to take advantage of available training, simply providing more resources and training opportunities may prove an ineffective solution.

Inadequate funding has been cited as a problem preventing sufficient training and professional development for immigration judges. As part of the Attorney General's reform measures, EOIR has implemented some additional aspects of training for new and veteran immigration judges. But EOIR also has reduced the quality or extent of other training components. For example, the annual national conference of immigration judges has been cancelled due to lack of funding several times in the past decade, including in 2003, 2004, 2005, and 2008.[164] The lack of funds also prevents updating reference materials and providing live, in-person training rather than recordings of past training sessions.

Finally, some immigration judges have complained that too much of the limited time available at recent conferences has been spent upbraiding them for poor work quality rather than focusing on productive opportunities for professional development and training.[165]

---

156 *See, e.g.*, HUMAN RIGHTS FIRST BLUEPRINT, *supra* note 120, at 9.

157 Lindsey R.Vaala, *Bias on the Bench: Raising the Bar for U.S. Immigration Judges to Ensure Equality for Asylum Seekers*, 49 WM. & MARY L. REV. 1011, 1036 (2007) (recommending that immigration judges receive cultural sensitivity training); GOVERNMENT ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL REQUESTERS, U.S. ASYLUM SYSTEM: AGENCIES HAVE TAKEN ACTION TO HELP ENSURE QUALITY IN THE ASYLUM ADJUDICATION PROCESS, BUT CHALLENGES REMAIN 35 (2008), *available at* http://www.gao.gov/new.items/d08935.pdf [hereinafter CHALLENGES REMAIN] (reporting on a survey of immigration judges, 59% of whom responded that training in assessing credibility is greatly or moderately needed, and 74% of whom responded that training in identifying fraud is greatly or moderately needed).

158 In a survey of immigration judges conducted by the Government Accountability Office, 80% of judges reported that attending national conferences for immigration judges in person greatly or moderately enhanced their ability to adjudicate asylum cases, whereas only 15% reported that attending through teleconferencing, videoconferencing, or pre-recorded sessions greatly or moderately enhanced their ability to adjudicate cases. CHALLENGES REMAIN, *supra* note 157, at 130.

159 *Id*. at 131-32. Eighty-five percent of immigration judges reported that informal meetings with other immigration judges greatly or moderately enhanced their ability to adjudicate asylum cases, and 75 percent reported that additional meetings of this type are greatly or moderately needed.

160 Lustig, et al., *Burnout and Stress*, *supra* note 77.

161 Over a two-year period, OCIJ, in consultation with EOIR, developed case completion goals for each of OCIJ's 11 types of immigration cases. OCIJ formally implemented these goals in May 2002. *See* GAO CASELOAD REPORT, *supra* note 49, at 20-22. For examples of case completion goals, *see* Section II.C.3.a, *supra.*

162 Sixty-eight percent of immigration judges reported using at least half of their allocated administrative time to hear cases. 41% reported using all or almost all of the allocated administrative time for this purpose. CHALLENGES REMAIN, *supra* note 157, at 132.

163 Lustig et al., *Inside the Judges' Chambers, supra* note 77, at 75-76.

164 *See* TRAC PROGRESS REVIEW, *supra* note 136.

165 Lustig et al., *Inside the Judges' Chambers, supra* note 77, at 19. More broadly, many immigration judges have reported dissatisfaction with the overall level of support and respect demonstrated by EOIR and DOJ in general for the work they do and the pressures they face. *Id.*

4. Inadequate Supervision and Discipline

Although the quality of immigration judges has long been a concern,[166] the current surge of interest in the issue appears to stem from the upswing in the number of published federal circuit court opinions critical of immigration judges beginning in 2002.[167] The increased attention has led observers of and participants in the immigration adjudication system to identify a number of issues with respect to supervision, performance, and discipline of immigration judges. These issues can be grouped into several broad categories: lack of appropriate supervision, lack of transparency and accountability in the disciplinary process, and improper political influences.

a. Lack of Appropriate Supervision

A number of observers have noted that there are simply too few ACIJs to properly supervise the more than 200 immigration judges serving in more than 50 immigration courts and hearing sites across the country.[168] Until 2006, the ACIJs supervised primarily or exclusively from OCIJ headquarters offices in Virginia. Even with the recent addition of a number of new ACIJ positions since late 2006, there are still more than 20 immigration judges per ACIJ. Given that immigration judges are widely dispersed geographically and that ACIJs must handle their own dockets in addition to their supervisory and administrative duties, it is difficult to see how the ACIJs can adequately supervise the immigration judge corps. These difficulties are only compounded by the lack of guidance from EOIR regarding the ACIJ's supervisory role.[169]

Although EOIR instituted a pilot program to deploy ACIJs to the regional immigration courts in 2006,[170] concerns regarding the ratio of ACIJs to immigration judges and the geographic dispersion of immigration judges persist.[171] In addition, EOIR's continuing staffing problems threaten to exacerbate the situation. EOIR reported in August 2008 that there were eleven ACIJs, six of whom were physically based in one of the courts they supervise,[172] but as of December 2009, the EOIR website identified ten ACIJs, five based outside of OCIJ headquarters.[173]

In addition to staffing concerns, without clear standards of performance for immigration judges, ACIJs are left without appropriate guidance to supervise and evaluate the immigration judges.[174] In this vacuum, it appears that quantitative measures of productivity have taken a prominent role in the supervision and evaluation of immigration judges.[175] While productivity may be a proper subject of performance review, an overemphasis on this factor can be problematic. As one immigration judge noted, "[w]hat is required to meet the case completions is quantity over quality."[176] One study has suggested that such pressures may be a contributing factor to the disparity of asylum grant rates among immigration

---

166 *See, e.g.*, TRAC Disparities Report, *supra* note 118 (noting that practitioners, federal appeals court judges, organizations representing noncitizens, and others have for many years complained about numerous occasions when the immigration judges have failed to achieve fair, expeditious, and uniform application of the nation's immigration laws).

167 *See, e.g.*, Xue v. B.I.A., 439 F.3d 111, 127-128 (2d Cir. 2006); Cham v. Att'y Gen., 445 F.3d 683, 685-686 (3d Cir. 2006); Benslimane v. Gonzales, 430 F.3d 828, 830 (7th Cir. 2005); Kadia v. Gonzales, 501 F.3d at 817, 821 (7th Cir. 2007); Zehayte v. Gonzales, 453 F.3d 1182, 1194-1195 (9th Cir. 2006) (Berzon, J., dissenting).

168 *See, e.g.*, *Immigration Litigation Reduction: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 5-6 (2006) (statement of Judge John M. Walker, Jr., Chief Judge of the U.S. Court of Appeals for the Second Circuit); *Legomsky Testimony*, *supra* note 120; Lustig et al., *Inside the Judges' Chambers*, *supra* note 77; TRAC Progress Review, *supra* note 136.

169 *See* Section II.C.3.b., *supra*.

170 *See* Attorney General Reform Measures, *supra* note 6, at 3.

171 GAO Report on Variation, *supra* note 54, at 44-45.

172 TRAC Progress Review, *supra* 136.

173 OCIJ Biographies, *supra* note 11.

174 *See* GAO Report on Variation, *supra* note 54, at 45-46 (noting that EOIR has not provided explicit guidance for the ACIJ supervisory role).

175 *See, e.g.*, Marks, *supra* note 9, at 2 (noting NAIJ's concern over production pressures); Lustig et al., *Inside the Judges' Chambers*, *supra* note 77 (listing immigration judge complaints regarding pressure to meet case completion goals); *see also* GAO Caseload Report, *supra* note 49.

176 Lustig et al., *Inside the Judges' Chambers*, *supra* note 77, at 65. Other judges were more extreme in their description of the situation. One noted that "judges have to grovel like mangy street dogs to get exemptions from unrealistic completion goals," while another decried "the drip-drip-drip of Chinese water torture that I hear in my head (i.e., in my mind, hearing my boss saying: 'more completions, more completions, bring that calendar in, you are set out too far, you have too many reserved decisions, why has that motion been pending so long, too many cases off calendar')." *Id.*

judges deciding similar cases and the poor quality of work by immigration judges observed by the federal circuit courts and others.[177]

Supervision of immigration judges also suffers from a lack of appropriate feedback mechanisms. Currently, there appears to be no clear process for providing immigration judges with regular feedback on their performance. The AG's proposal to implement a formal performance review system was in part meant to address this concern. Almost three years after the AG announced the measure, EOIR announced that performance evaluations would be implemented on July 1, 2009.[178] This delay may have been due in large part to opposition from NAIJ. While the AG had apparently been promoting a performance review system based on the standard civil service model, NAIJ, concerned about building and maintaining decisional independence, was pushing for a judicial model.[179] Although EOIR has announced implementation of performance evaluations, it has provided only limited details regarding the new system.[180] Therefore, it remains to be seen whether the announced evaluations will represent a workable performance review and feedback system. Even if the new performance review system is successful, implementation of additional feedback mechanisms, formal or otherwise, may also be helpful for improving immigration judge performance.[181]

Another significant issue hindering appropriate supervision of immigration judges is EOIR's lack of data collection and analysis capabilities. Recent GAO reports have highlighted EOIR's shortcomings in this regard, including caseload reporting inconsistencies and a lack of maintenance of historical data,[182] as well as a lack of expertise needed to collect and analyze asylum grant data.[183] Without improvement in these areas, EOIR will have a difficult time addressing disparities of asylum grant rates and identifying, analyzing, and addressing other issues relating to the quality of decisions and performance of immigration judges.[184]

b. Lack of Transparency and Accountability in Discipline

Although there are standards and processes in place to address conduct and ethics issues among immigration judges,[185] many observers are concerned that the standards are inadequate and that so little is known about the processes, both outside and within the system.[186]

Observers argue that the multiple, overlapping standards do not provide a clear enough framework for immigration judges and ACIJs to rely upon.[187] The executive branch and DOJ policies do not address many of the issues that are particular to immigration adjudication, and the application of generalized standards to the specific difficulties that immigration judges face leaves much to be desired.[188] Those policies focus largely on financial and other conflicts of interest,[189] provide only the most general of guiding principles for areas such as competence (e.g.,

177 *Id.* at 58.

178 *See* EOIR Improvements Update, *supra* note 7, at 1.

179 *See* NAIJ Letter to Margolis, *supra* note 86, at 1-2. *See also* Section IV.B.3 *infra* (recommending performance reviews based on the judicial models proposed by the ABA and others).

180 *See* TROUBLED INSTITUTION, *supra* note 55 (reporting that the performance evaluations will address "Legal Ability, Professionalism, and Accountability for Organizational Results," but noting that EOIR had not released a copy of the new performance work plan for immigration judges).

181 *See, e.g.*, Ramji-Nogales et al., *supra* note 113, at 382 (recommending internal conferencing to address asylum grant rate disparities); Lustig et al., *Burnout and Stress, supra* note 77, at 30 (recommending peer support networks).

182 GAO CASELOAD REPORT, *supra* note 49, at 30.

183 GAO REPORT ON VARIATION, *supra* note 54, at 41 (explaining that recent studies conducted by EOIR lack the necessary "statistical controls" to ensure their accuracy).

184 *Id.*

185 *See* EOIR Progress Overview, *supra* note 7, at 3.

186 *See, e.g.*, Benedetto, *supra* note 152, at 505-08 (noting lack of clear and consistent standards of ethics and conduct for immigration judges); TRAC PROGRESS REVIEW , *supra* note 136 (noting that EOIR has not published or disseminated details of the new complaint procedures to the public or even to immigration judges); Marks, *supra* note 9, at 7 (detailing NAIJ's concerns over post-reform complaint procedures and OPR investigations).

187 Benedetto, *supra* note 152, at 505-08. *See* Section II.C.3.d, *supra*.

188 Benedetto, *supra* note 152, at 505-08.

189 *See, e.g.*, 5 C.F.R. pt. 2635.

"[e]mployees shall put forth honest effort in the performance of their duties"),[190] and do not address adjudication-specific issues such as *ex parte* communications at all. Even the EOIR Ethics Manual largely rehashes the contents of the broader executive branch and DOJ policies and provides relatively little additional and specific guidance.[191]

EOIR's proposed "Codes of Conduct" for immigration judges and BIA members published in 2007 were based largely on the American Bar Association's Model Code of Judicial Conduct.[192] Commentators have noted, however, that the proposed Codes remain vague and lack the concrete guidance that immigration judges need.[193] Moreover, EOIR abandoned the rulemaking process and instead announced its intention to further modify and incorporate the proposed Codes into the existing EOIR Ethics Manual.[194] As of July 2009, this process was still pending.[195] Some observers are concerned that this process is taking place without the opportunity for public comment (through a rulemaking or otherwise) and may hinder efforts to produce a clear and effective code of conduct.[196]

Without more information on the disciplinary process (procedures for complaints, types of complaints, procedure for investigations, disciplinary measures taken, availability of appeals, etc.), it will be difficult to hold accountable individual immigration judges for their misconduct and OCIJ, EOIR, and the AG for failures of the disciplinary process.[197] GAO reported in 2006 that 129 complaints were brought against immigration judges in fiscal years 2001 through 2005.[198] Disciplinary action was taken in approximately 25% of these cases and ranged from counseling (18 cases) to internal reprimands (12 cases) and suspensions (four cases).[199] An additional 22% of the complaints were referred to OPR or OIG, and several of these also resulted in discipline.[200] Outside of these statistics, however, information about the complaint process and resulting disciplinary actions is generally not available.

From the inside, immigration judges also are concerned about a lack of transparency.[201] Even though EOIR has begun to implement new complaint and disciplinary procedures, it has not disseminated details of these changes to the immigration judges themselves.[202] As a result, the judges are concerned about arbitrary and counter-productive discipline, particularly when OPR and OIG are involved.[203] This lack of transparency is compounded by the vague and confusing web of conduct and ethics codes applicable to immigration judges, none of which contains clear enforcement mechanisms.[204]

Finally, commentators have observed that discipline of immigration judges is almost wholly contained within EOIR and DOJ, without external

---

190 5 C.F.R. § 2635.101(b)(5).

191 Benedetto, *supra* note 152, at 501-08. As noted above, the EOIR Ethics Manual does provide some commentary and references to the ABA Model Code of Judicial Conduct, but the Model Code remains an "aspirational" guide.

192 *See* Proposed Codes of Conduct, *supra* note 92; *see also* ABA, Model Code of Judicial Conduct (2007).

193 Benedetto, *supra* note 152, at 505 (noting that, unlike the ABA Model Code, the proposed Codes of Conduct fail to define key terms and provide specific commentary).

194 *Oversight Hearing on the Executive Office of Immigration Review, Subcomm. on Immigr., Citizenship, Refugees, Border Security, and International Law of H. Comm. on the Judiciary,* 110th Cong. 30-39 (2008) , *available at* http://trac.syr.edu/immigration/reports/199/23Sep08Statement_TRAC_Susan_B_Long.pdf [hereinafter *Long Statement*] (prepared testimony and statement for the record of Susan B. Long, Co-Director, Transactional Records Access Clearinghouse).

195 EOIR Improvements Update, *supra* note 7, at 3.

196 *See Long Statement*, *supra* note 194, at 35; *see also* TRAC Progress Review, *supra* note 136.

197 *See, e.g.*, Benedetto, *supra* note 152, at 509 (noting the belief of some practitioners that "nothing ever happens" to complaints).

198 GAO Caseload Report, *supra* note 49, at 28.

199 *Id.*

200 *Id.* at 28-29.

201 Marks, *supra* note 9, at 7 (noting, for example, that OPR investigations of complaints are the "present day equivalent of yesterday's tattling to the INS District Directors, as they circumvent proper appellate procedures and leave Immigration Judges personally vulnerable for their legal decisions, clearly an inappropriate consequence of merely performing one's job in good faith"); *see also* NAIJ Letter to Margolis, *supra* note 86, at 1-2.

202 TRAC Progress Review, *supra* note 136.

203 Marks, *supra* note 9, at 7.

204 Benedetto, *supra* note 152, at 508.

review in most instances.[205] When coupled with a lack of transparency, the opportunities for misuse and abuse of disciplinary procedures (and even non-disciplinary supervisory tools) are dramatically increased.[206]

c. Improper Political Influence

Several observers have argued that political and management pressures in recent years have contributed to an atmosphere in which improper political influence threatens (or appears to threaten) the decisional independence of immigration judges.[207] These pressures, whether perceived or actual, are believed by some observers to have affected the performance of immigration judges.[208] The recent politicization of immigration judge hiring and the so-called "purge" of the BIA raised the specter of improper political considerations in performance reviews and discipline of immigration judges.[209] When these factors are combined with the significant emphasis on quantitative productivity goals and the advent of performance reviews, immigration judges are potentially becoming more susceptible to political pressures.[210]

Even in the absence of direct political pressure, the prevailing views on immigration enforcement of the AG (a political appointee) could influence immigration judges to "default" to certain rulings, which is a possible factor behind the large disparities in asylum grant rates.[211] The lack of transparency within EOIR and the lack of independent review of conduct from outside DOJ noted above only compound the prospects and potential effects of improper political influences.

5. Tenure, Retention, and Removal of Immigration Judges

As career attorneys in DOJ with no fixed term of office, immigration judges are in an awkward position with respect to tenure. On one hand, unless removed for disciplinary reasons, an immigration judge can potentially serve for life. On the other hand, immigration judges remain subject to the discretionary removal and transfer authority of the AG.

This dichotomy, "near life" employment without guaranteed tenure, raises two significant causes for concern. First, the possibility of essentially life tenure limits the accountability of immigration judges.[212] Such accountability limits are compounded by the method by which judges are selected. Unlike Article III judges, immigration judges do not undergo the sometimes intense public vetting process that accompanies the constitutional appointment process. Unlike some state judges, immigration judges are not subjected to the public scrutiny that can result from judicial elections. Even if performance or competency issues with a particular immigration judge are made public, there is little opportunity for public interest groups, the immigration bar, and other interested parties, to act.[213]

Second, and in contrast to the first point above, it has been argued that the lack of fixed or life tenure also serves to erode the decisional independence of

---

205 *Id*. at 509 (noting that the current system process begins and ends within EOIR). *See also* TROUBLED INSTITUTION, *supra* note 55 (noting lack of information on rights of appeal within the current disciplinary process). Immigration judges may appeal certain removal decisions to the Merit Systems Protection Board, but re-assignment without loss of pay or grade and other adverse disciplinary actions are not appealable. *See* Legomsky, *Deportation and the War on Independence*, *supra* note 102, at 373-74.

206 Benedetto, *supra* note 152, at 509.

207 *See, e.g.,* Legomsky, *Deportation and the War on Independence*, *supra* note 102, at 372-75; Marks, *supra* note 9, at 7.

208 *Id*.; *see also* Lustig et al., *Burnout and Stress*, *supra* note 77, at 22-23; Lustig et al., *Inside the Judges' Chambers, supra* note 77, at 79. In addition, politically-influenced hiring may have led to hiring of inexperienced immigration judges (in terms of both substantive immigration law and adjudication experience), and thus contributed to poor quality decisions. But concerns over the quality of immigration judges also existed before the recent problems with politicized hiring. *E.g.*, interview with Jeanne Butterfield, former Executive Director, American Immigration Lawyers Association (noting that quality of immigration judges is a long standing issue).

209 *See* Part 3: Board of Immigration Appeals, *infra*.

210 *See* Marks, *supra* note 9, at 14 (noting that performance pressures are a "backdrop" to the "untenable position" of immigration judges within DOJ).

211 *E.g.*, interview with Hon. Bruce Einhorn, retired immigration judge and Adjunct Professor of Law, Pepperdine University School of Law (suggesting that political views of administration and Congress create impression of preference for more asylum denials and noting that, in face of unrealistic case completion goals, denying asylum may appear easier to some immigration judges than granting asylum).

212 *See, e.g.*, Caplow, *A New Year and the Old Debate, supra* note 146, at 97-98.

213 The public may file complaints regarding the conduct of individual immigration judges, but as noted previously, many observers feel that this process is itself inadequate. *See, e.g.*, Benedetto, *supra* note 152, at 509.

immigration judges.[214] Unlike Article III judges with true life tenure,[215] Article I court judges with fixed terms, or administrative law judges with statutory protections against their home agencies, [216] immigration judges are subject to the discretionary authority of the AG to remove or transfer them from the bench at any time.[217] Although it appears that this authority has been used infrequently in the past, the reduction of the number of BIA members in 2002 made use of the AG's authority and served as a reminder that immigration judges are not immune from similar actions. As a result, some observers, including the judges themselves, have expressed concerns related to the lack of job security of immigration judges.[218]

These concerns parallel many of those discussed above in relation to supervision and discipline.[219] Most notably, without protections from arbitrary removal from the bench, immigration judges may feel threatened by political pressure from the AG — the nation's chief law enforcement officer and a political appointee — and by management pressures from supervisors within EOIR and DOJ. Such pressures could ultimately undermine the decisional independence of immigration judges, potentially manifested as asylum grant rate disparities, "default" rulings (as discussed above in Section III.A.4.c), and the erosion of the legitimate use of substantive and procedural discretion, among other ways.[220] As a result, discretionary removal power in the hands of the AG may also undermine the perception of immigration judge impartiality.

B. Problems With Immigration Court Proceedings

There is also growing evidence of a host of additional difficulties ranging from the manner in which judges render their decisions to the unavailability of important technological resources, such as digital recording equipment, and the overuse of videoconferencing.

1. The Way in Which Decisions Are Rendered

Currently, immigration judges typically render their decisions in merits hearings orally, sometimes after only a short break in the proceedings. Although EOIR provides decision outlines to encourage clear and reasoned oral decisions,[221] time constraints and the complexity of cases make it difficult for immigration judges to fully deliberate before issuing a decision. Notably, many immigration judges have expressed frustration with the lack of time to properly research legal issues and country conditions before

214 *See, e.g.*, Legomsky, *Deportation and the War on Independence*, *supra* note 102, at 373-75; Marks, *supra* note 9, at 7.

215 U.S. Const., art. III, § 1 ("Judges, both of the supreme and inferior courts, shall hold their Offices during good Behaviour.").

216 5 U.S.C. § 7521 (providing that administrative law judges may only be removed for good cause established and determined by the Merit Systems Protection Board).

217 *See* 8 U.S.C. § 1101(b)(4) ("An immigration judge shall be subject to such supervision . . . as the Attorney General shall prescribe."); Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,893 (Aug. 26, 2002) (codified at 8 C.F.R. pt. 3) ("All attorneys in the Department are excepted employees, subject to removal by the Attorney General, and may be transferred from and to assignments as necessary to fulfill the Department's mission."). Although an immigration judge may appeal an outright removal to the Merit Systems Protection Board, re-assignment without loss of pay or grade is not appealable. Legomsky, *Deportation and the War on Independence*, *supra* note 102, at 373-74.

218 *See, e.g.*, Caplow, *A New Year and the Old Debate*, *supra* note 146, at 98 (noting that immigration judges' "dependency on the hand that feeds them" makes them vulnerable); Legomsky, *Deportation and the War on Independence*, *supra* note 102, at 373-75 (noting the chilling effect of the AG's discretionary authority); Marks, *supra* note 9, at 7 (noting the "untenable position" of immigration judges within DOJ).

219 *See* Section III.A.4.c, *supra*.

220 Such issues are compounded by statutory limits on the discretion of immigration judges. For example, in 1996, the Illegal Immigration Reform and Immigrant Responsibility Act curtailed judicial discretion in a number of ways, including by limiting discretion to waive an order of removal where a lawful permanent resident had lived in the United States for seven years or more. *See* Lenni B. Benson, *Making Paper Dolls: How Restrictions on Judicial Review and the Administrative Process Increase Immigration Cases in the Federal Courts*, 51 N.Y.L. Sch. L. Rev. 37, 50 (2006-07). In one commentator's view, by virtue of these changes, "Congress transformed the removal decision from a human paradigm into an inflexible, mechanical structure." Maritza I. Reyes, *The Latino Lawful Permanent Resident Removal Cases: A Case Study of Nicaragua and a Call for Fairness and Responsibility in the Administration of U.S. Immigration Law*, 11 Harv. Latino L. Rev. 279, 307-08 (2008). In response to changes like these, the ABA has previously recommended that "Congress . . . enact legislation to restore the authority of immigration judges to grant discretionary relief to immigrants on a case by case basis." ABA, Ensuring Fairness and Due Process In Immigration Proceedings 7 (2008), *available at* http://www.abanet.org/poladv/transition/2008dec_immigration.pdf.

221 *See* EOIR, Immigration Judge Benchbook, http://www.justice.gov/eoir/vll/benchbook/index.html (last visited Nov. 3, 2009).

issuing their opinions.[222] For example, one immigration judge explained:

> The hearings are complex, fully litigated, and take the full hearing time (3 or 4 hour hearing slots) and more. It is common to run out of time to do the oral decision. In that case, I have to reset the case for another day for oral decision or do a written decision. In complex cases, it is better to prepare a written decision in order to cover all the issues in a well-reasoned decision. However, there isn't enough time in the day to prepare written decisions.[223]

As a result, immigration judges often feel pressured to issue oral decisions even when further deliberation may be necessary.[224]

The lack of reasoned written decisions by immigration judges makes it difficult to determine the bases of a decision for respondents and their counsel, for the BIA and for the circuit courts. This can discourage legitimate appeals of adverse decisions and frustrate effective review of those cases that are appealed. In particular, federal appellate judges have frequently criticized the ill-reasoned and/or incomplete oral decisions of immigration judges that have reached the circuit courts.[225]

2. Inadequate Technological Resources

Immigration judges have complained about the technological resources and support services they receive, attributing some of the systemic problems in part to these underlying issues. According to a September 2008 GAO survey of roughly 160 immigration judges, 90% of them were dissatisfied with the quality of recording equipment (72% were very dissatisfied), over 60% of them were dissatisfied with the quality of transcription services, and 40% were dissatisfied with the quality of over-the-phone contract interpreters. Asked whether various changes would improve their ability to carry out their judicial responsibilities, 73% said that digital recording equipment would greatly improve their performance, and over half said that written transcripts of their proceedings before making a decision would improve their ability to carry out their duties.[226]

3. Problems with Videoconferencing

Meanwhile, noncitizens, their lawyers, and commentators have expressed concern that videoconferencing may be undermining the fairness of the immigration court system. In 1996, amendments to the INA explicitly authorized the use of videoconferences in removal proceedings.[227] As of 2006, videoconferencing equipment was available at 40 immigration courts across the country, 77 other facilities, and EOIR headquarters.[228] The recent growth in the use of videoconferencing has made it difficult for attorneys and their clients to communicate with one another in a confidential setting.

EOIR has defended videoconferencing as a useful tool for case management that saves time and reduces cost. Attorneys have lodged a variety of complaints, however, noting that translators are often in a separate

---

222 *See, e.g.*, Lustig, et al., *Inside the Judges' Chambers*, *supra* note 77, at 64-67 (discussing immigration judge comments regarding significant time constraints); CHALLENGES REMAIN, *supra* note 157, at 138 (noting that 83% and 77% of immigration judges found time limitations and caseload management, respectively, to be very or moderately challenging).

223 *Id.* at 65.

224 One immigration judge noted that it is "an excruciating punishment to reserve a decision." *Id.*

225 *See, e.g.*, Ming Shi Xue v. B.I.A., 439 F.3d 111, 113 (2nd Cir. 2006) ("[D]espite their volume, these suits are not to be disposed of improvidently, or without the care and judicial attention — by immigration judges in the first instance . . . — to which all litigants are entitled."); Rexha v. Gonzales, 165 F. App'x 413, 418 n.3 (6th Cir. 2006) ("Immigration courts must review all of the evidence and make decisions based on consideration of the record as a whole . . . . These proceedings are not about speed and docket clearing. . . . [I]mmigration courts should take some extra time to consider all of the evidence . . . . [T]here must be evidence in the record that all the evidence was considered."); Zhen Li Iao v. Gonzales, 400 F.3d 530, 535 (7th Cir.2005) ("[W]e are not authorized to affirm unreasoned decisions even when we understand why they are unreasoned.").

226 *See* CHALLENGES REMAIN, *supra* note 157, at 124-25. Digital recording equipment provides a number of benefits, including enhanced sound quality and more durable storage media, immediate and remote access to all or part of a recording within seconds, reduced storage requirements, simultaneous recording and playback, and more timely and lower cost transcriptions. *See* LIZBETH L. PATTERSON, INST. FOR COURT MGMT., TRANSITION FROM AUDIOTAPES TO DIGITAL TECHNOLOGY IN THE FEDERAL IMMIGRATION COURTS 12-13 (2000), *available at* http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/tech&CISOPTR=127.

227 *See* 8 U.S.C. § 1229a(b)(2)(A)(iii).

228 *See* Aaron Haas, *Videoconferencing in Immigration Proceedings*, 5 PIERCE L. REV. 59, 63 (2006).

location, worsening the difficulty and accuracy of translating for detainees who do not speak English; that poor equipment and sound quality exacerbate the problem of understanding even those who do speak English; that only security guards (rather than court officials) are available at detention centers to assist the court when problems arise; and that it is harder to use, present, and address evidence in these settings.[229] Commentators have also noted that the lack of nonverbal communication, specifically the inability to use and closely observe body language, makes it difficult for parties to truly understand one another.[230] Moreover, because it makes it more difficult to establish credibility and connect emotionally with the judge, videoconferencing makes it harder for respondents to argue their cases.[231]

Evidence of these concerns is neither purely theoretical nor conjectural. In 2004, researchers observed 110 immigration hearings in Chicago using videoconferencing. They reported observing problems in 45% of the proceedings, ranging from technical difficulties, to issues of translation, to lack of access to counsel.[232] Another study — analyzing decisions in over 500,000 cases — concluded that the use of video teleconferencing "*doubles* the likelihood that an asylum applicant will be denied asylum."[233] Thus, in 2006, 44.87% of noncitizens seeking asylum whose hearings were conducted in person were granted asylum while only 21.86% of those subjected to videoconferencing proceedings were granted asylum. Similarly, in 2005, in-person hearings yielded a grant rate of 38.20%, compared to 23.7% for hearings held by videoconference.[234]

C. Status of 2006 Reforms Announced by the Attorney General

In September 2008, two years after Attorney General Gonzales announced reforms to improve the immigration court system, TRAC issued a report finding that only a few of the proposed 22 reform efforts had been fully implemented.[235] Among these measures, TRAC found the following reforms to be substantially completed: the appointment of additional Assistant Chief Immigration Judges; the completion of the Immigration Court Practice Manual and the Judicial Benchbook; the nationwide implementation of a new digital audio recording system in the immigration courts; the formation of a pro bono committee; and the implementation of some changes designed to increase pro bono representation.[236] However, TRAC also found that the administration and DOJ failed to implement several other reforms, including: conducting performance evaluations of immigration judges; implementing a judicial code of conduct; and consistently seeking additional funding to hire additional immigration judges.[237] TRAC also reported that many of the twenty-two reforms were partially incomplete or were opaquely implemented in a way that limited the ability to improve the immigration court system. These included:

- Appointing a new ACIJ to handle complaints against judges, but failing to publish any

229 *See generally* Peggy Gleason, *Reality TV for Immigrants: Representing Clients in Video Conference Hearings*, 5 BENDER'S IMMIGR. BULL. 732 (2000); *see also* APPLESEED, ASSEMBLY LINE INJUSTICE: BLUEPRINT TO REFORM AMERICA'S IMMIGRATION COURTS 23 (2009).

230 *See* Haas, *supra* note 228, at 68-71; APPLESEED, *supra* note 229, at 22.

231 *See* Haas, *supra* note 228, at 68.

232 *See* THE LEGAL ASSISTANCE FOUND. OF METRO. CHI. & CHIC. APPLESEED FUND FOR JUSTICE, VIDEOCONFERENCING IN REMOVAL HEARINGS: A CASE STUDY OF THE CHICAGO IMMIGRATION COURT 5-7 (2005).

233 Frank M. Walsh & Edward M. Walsh, *Effective Processing or Assembly-Line Justice? The Use of Teleconferencing in Asylum Removal Hearings*, 22 GEO. IMMIGR. L.J. 259, 271 (2008) (emphasis added).

234 *Id*.

235 TRAC PROGRESS REVIEW, *supra* note 136.

236 *Id*. TRAC, however, observed that contrary to the Attorney General's directive, EOIR's pro bono committee did not include private bar stakeholders, and the agency did not publicly release the committee's full recommendations. *Id.* In addition, the inclusion on this list of the implementation of digital audio recording was perhaps premature as EOIR had reported that only 17 of 54 immigration courts had been updated as of the date of the TRAC report. *Id.*

237 *Id*.

information showing that EOIR clearly defined the roles of EOIR, OPR, and OIG in handling complaints;

- Implementing a system for the Office of Immigration Litigation and the BIA to refer to OCIJ cases where there is an apparent problem of judicial misconduct or misapplication of the law, but failing to systematically track and report statistics of such referrals;
- Implementing some additional areas of training for immigration judges, but reducing the quality and extent of other training programs, such as the annual conference, due to a lack of funding;
- Instituting an examination for newly hired immigration judges, but failing to demonstrate that the exam measures competency in immigration law and failing to make public the methods for developing the exam or measuring the results;
- Increasing scrutiny of newly appointed judges during their two-year trial period, but failing to provide information on how EOIR "continually monitor[s]" judicial temperament and skills, how many problems have been found through such monitoring, and what remedial actions, if any, have been taken;
- Increasing scrutiny of court interpreters, but abandoning plans to certify interpreters externally; and
- Monitoring judges with unusually high or low asylum grant rates, and stating that EOIR uses those data to determine whether further action is necessary, but failing to provide data on how often monitoring led to action, details about the monitoring itself, or criteria for how "unusually high or low asylum grant rate discrepancies" are defined or determined.[238]

On June 5, 2009, EOIR released an update on the progress of the improvement measures, stating that 16 of the 22 measures had been completed.[239] The measures still pending relating to immigration judges and the immigration courts include performance evaluations for immigration judges, adoption of a code of conduct for immigration judges, enhanced authority for immigration judges to sanction attorneys for misconduct, and full implementation of digital audio recording.[240] EOIR's update, however, did not address any of the concerns raised by TRAC regarding incomplete or opaque implementation. In an updated report, TRAC reiterated that the implementation of several of the reforms, particularly substantive immigration law training, examination of immigration judges, and complaint procedures, remains opaque.[241]

IV. Recommendations Relating to Immigration Judges and Immigration Courts

Part 6 of this Report examines three alternatives for restructuring the system of removal adjudication: (1) placing all of EOIR's functions in an Article I court structure; (2) placing all of EOIR's functions in a new independent administrative agency in the Executive Branch; or (3) a hybrid approach moving the trial-level functions now exercised by the immigration courts to an independent agency, and the appellate-level functions now exercised by the BIA to an Article I court. As discussed in detail in Part 6, this Report recommends the first alternative: placing all of EOIR's functions in an Article I court structure.

In this Section, we focus on recommendations for specific reforms to the immigration courts within the existing EOIR structure, including proposals with respect to the selection, tenure, and removal of judges and their supervision, evaluation, and discipline to help ensure a more professional immigration judiciary. In addition, we include recommendations that address problems relating to caseloads and shortages of personnel; the use of written decisions; administrative time for immigration judges; the training and professional development of immigration judges; codes of ethics and conduct applicable to immigration judges; data collection and analysis; immigration court technology; the use of videoconferencing; and the use of prehearing conferences. This latter group of recommendations applies either within or outside of the recommended restructuring of the immigration courts and the BIA.

238 *Id.*

239 *See* EOIR Improvements Update, *supra* note 7.

240 *Id.*

241 *See* TROUBLED INSTITUTION, *supra* note 55.

A. Recommended Changes to the Hiring, Tenure, and Removal of Immigration Judges

1. Provide Additional Hiring Criteria and More Public Participation in the Hiring Process

As discussed above in Section II.C.1, EOIR has made significant improvements to the criteria and procedures for hiring immigration judges. While the immigration courts remain within DOJ, these new procedures should be given time to prove their merits. If the procedures prove successful, they should be implemented through legislation or regulation in order to prevent their abandonment or wholesale revision unilaterally by an Attorney General for political or other inappropriate reasons. Meanwhile, we recommend the following additional improvements in response to the problems discussed above in Section III.A.2.

a. Additional Hiring Criteria

As discussed in Section III.A.2.a, *supra*, EOIR should add questions to the immigration judge hiring application that seek, in narrative form, information from the candidate about his or her experience and aptitude in areas such as sensitivity to cultural differences and the ability to treat all persons with respect. Those conducting interviews of candidates should pose questions designed to elicit the candidate's background in these areas. A candidate's references should be asked about the candidate's demonstrated capacity for judicial temperament, cultural sensitivity, respect for peers and subordinates, and any predispositions in making credibility determinations.

b. More Public Participation in the Hiring Process

EOIR should incorporate more public input into the hiring process.[242] EOIR could accomplish this goal by inviting organizations within the profession, such as the American Bar Association ("ABA") or the American Immigration Lawyers Association ("AILA"), to participate in the screening or rating of candidates who reach the final levels of consideration. Of course, inviting such input could increase delay in the hiring process and may expose EOIR to additional criticism if the groups believed EOIR or the Attorney General's office ignored their input. To minimize delay, EOIR could allow a reasonable, but fairly narrow, window within which such groups could comment on candidates. And, although it would likely not prevent all criticism, EOIR could also make it clear that while the outside input would be considered during the hiring process, EOIR and the Attorney General's office retain ultimate authority to approve or reject a candidate.[243]

2. Protect Immigration Judges from Removal Without Cause

In order to protect immigration judges from reprisal or fear of reprisal for independent decision making, they should be given statutory protection against removal or discipline without good cause.

This recommendation is in keeping with Resolution 101B adopted by the ABA on August 6, 2001, which was also included in the February 2005 Report of the ABA Section of Administrative Law on proposed changes to the Administrative Procedure Act. ABA Resolution 101B recommends that any removal or discipline of a member of the administrative judiciary occur only after an opportunity for a hearing under the federal or state administrative procedure act before an independent tribunal, with full right of appeal. The Section of Administrative Law recommended that full-time presiding officers responsible for adjudication in administrative agencies should be removed or disciplined only for good cause and only after a hearing to be provided by the Merit Systems Protection Board under the standards of a formal adjudication, subject to judicial review.[244] The rationale for the proposal is that presiding officers "should be protected from negative consequences for engaging in ethical and independent decisionmaking."[245]

---

242 *See* Caplow, *A New Year and the Old Debate*, *supra* note 146, at 97.

243 This recommendation is consistent with the appointment process recommended as part of the restructuring reforms outlined in Part 6. Under the restructuring recommendations, the Standing Referral Committee would allow outside stakeholders, including government agencies and non-government entities, to participate in the appointment of the trial level immigration judges, either through representation on the Committee or through a comment process. *See* Part 6, Section III.A.1.a, *infra*.

244 *See* ABA Section of Administrative Law and Regulatory Practice, [Untitled Report] 9 (2005) [hereinafter ADLaw Adjudication Report].

245 *Id.* at 9-10.

These recommendations thus would treat immigration judges in the same manner as ALJs with respect to removal from their positions. Accordingly, such protections for immigration judges should only be adopted in conjunction with the other recommendations in this Section IV with respect to hiring, training, supervision, ethical codes, and discipline that would help ensure a more professional immigration judiciary.

B. Recommended Changes to Supervision and Discipline of Immigration Judges

1. Improve Supervision of Immigration Judges by Increasing the Number of ACIJs and Expanding Their Deployment to Regional Courts

To address the shortcomings observed in the supervision of immigration judges (as discussed above in Section III.A.4.a), we recommend increasing the number of ACIJs overall and expanding the deployment of ACIJs to the regional courts. EOIR has reported that the pilot program to deploy ACIJs to regional courts has been successful, and it recommends making the program permanent.[246] EOIR suggested that an expansion of the program would bring additional benefits by providing a more optimal ratio of supervised judges to ACIJs and by decreasing the geographic range of each ACIJ's supervised territory.

Reducing the ratio of immigration judges to ACIJs would allow the ACIJs to give more attention to each supervised judge and allow ACIJs to act more proactively in supervision, addressing areas that may currently be overlooked in the face of unmanageable dockets, such as training programs.[247] Such a change also will provide more time for ACIJs to attend to their own dockets and other administrative duties.

Deploying new ACIJs onsite to regional courts could improve supervision by allowing greater opportunity for personal observation, and could reduce the time and cost associated with traveling between many geographically dispersed courts. To further enhance the benefits of regional supervision, we recommend that EOIR consider assigning ACIJs to supervise immigration courts by federal circuit. Not only could this further reduce the geographic range of some ACIJ territories, but it also could enable ACIJs to focus more effectively on substantive issues (which may vary from circuit to circuit).[248] Since the number of courts and immigration judges varies widely from circuit to circuit, some circuits will warrant the attention of more ACIJs while other circuits may be suitably supervised by only one ACIJ.[249] Where a given circuit does not have enough immigration judges to warrant its own ACIJ, two circuits could share one ACIJ.

As noted, there are currently only five ACIJs deployed outside of the headquarters immigration court and the current ratio of immigration judges to ACIJs exceeds twenty to one.[250] While the optimal ratio is not known, we recommend a significant increase in the number of ACIJs relative to the total number of immigration judges, particularly in high volume circuits. Importantly, if the number of immigration judges is expanded (as we recommend), the desired number of ACIJs should grow proportionately. The cost for a new ACIJ position is similar to the cost for a new immigration judge position.[251]

---

246 *See* TRAC PROGRESS REVIEW, *supra* note 136. TRAC noted that EOIR prepared a report on the effectiveness of the ACIJ pilot program for the Deputy Attorney General, but EOIR has not made that report public. *Id.*

247 With more ACIJs and more immigration judges (as is recommended below in this Report), it may eventually be possible to assign ACIJs exclusively to supervisory and administrative duties. We recommend, however, that ACIJs should be required to maintain at least a minimal docket to ensure that they remain familiar with the day-to-day work of immigration judges. Further, while EOIR has created at least two specialized ACIJ positions as part of the AG's reforms, we caution against over-specialization and assignment of tasks to ACIJs that may be more appropriately handled by administrative staff. *See* OCIJ Biographies, *supra* note 11 (noting special ACIJ positions for conduct and professionalism and for training of immigration judges, law clerks, and court staff).

248 While a number of ACIJs are already assigned to immigration courts sitting in one circuit, others cross several circuit lines: for example, one ACIJ supervises courts in the 2nd, 6th, 7th, 8th, and 10th circuits, while another supervises courts in the 1st, 2nd, 3rd, 4th, 6th, and 11th circuits. *See* EOIR, ACIJ Assignments, *supra* note 84.

249 For instance, nearly a quarter of the immigration judges sit in California alone, while only four immigration judges serve the entire 8th circuit. *Id.*

250 *See* Section III.A.4.a, *supra*.

251 *See* Section IV.C.1, *infra* (discussing the cost for a new immigration judge, which is approximately $185,000 for the initial year).

2. Consolidate, Clarify, and Strengthen Codes of Ethics and Conduct Applicable to Immigration Judges

In response to comments discussed above in Section III.A.4.b, the various codes of conduct and ethics applicable to immigration judges should be consolidated, clarified, and adapted to the particular issues facing immigration judges.[252] While the Codes of Conduct proposed in 2007 by EOIR are a step in the right direction, more is needed.[253] We recommend specifically that a new code of conduct, based on the ABA Model Code of Judicial Conduct ("ABA Model Code")[254] and tailored to the immigration adjudication system, be adopted.

In ABA Resolution 101B, adopted August 6, 2001, the ABA recommended that members of the administrative judiciary be held accountable under appropriate ethical standards adapted from the ABA Model Code in light of the unique characteristics of the particular positions in the administrative judiciary. Citing this resolution, the ABA Section of Administrative Law has recommended that the drafters of ethical rules should also consider the codes of ethics adopted by groups such as the National Conference of the Administrative Law Judiciary ("NCALJ"), which is a conference of the Judicial Division of the ABA, and the 1989 Code of Conduct for Administrative Law Judges.[255]

The NCALJ has adopted both a Model Code of Judicial Conduct for Federal Administrative Law Judges[256] and a Model Code of Judicial Conduct for State Administrative Law Judges.[257] While the NCALJ codes may be most relevant to immigration judges as administrative adjudicators, they are both based on *prior* versions of the ABA Model Code[258] and do not represent the most current statement of the ABA on judicial conduct.[259] While many differences are minimal, some are significant. For example, the NCALJ model code for federal ALJs retains hortatory language throughout the canons and commentary, which the ABA Model Code abandoned in 1990 in favor of mandatory language. In addition, the current ABA Model Code is well known and widely used in state judicial and administrative systems, and has developed a large body of case law and interpretive guidance.[260]

The ABA Model Code also has significant advantages over EOIR's proposed Codes of Conduct. While many of the canons included in the proposed Codes of Conduct are drawn directly from the ABA Model Code, these are abbreviated or otherwise modified in many cases. For a notable example, while the proposed Codes of Conduct state simply that an immigration judge "shall not, in the performance of official duties, by words or conduct, manifest bias or prejudice,"[261] Canon 3B(5) of the ABA Model Code states:

> A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, *including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual*

252 *See, e.g.*, Benedetto, *supra* note 152, at 486 (noting that "the number of applicable codes is itself indicative of a problem").

253 *Id*; *see also* Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits of Consistency*, 60 STANFORD L. REV. 413, 420-421 (2007).

254 MODEL CODE OF JUDICIAL CONDUCT (2007), *available at* http://www.abanet.org/judicialethics/ABA_MCJC_approved.pdf [hereinafter ABA MODEL CODE].

255 *See* ADLAW ADJUDICATION REPORT, *supra* note 244, at 9. In addition to the ABA Model Code and the NCALJ model codes, other potential models are available, including the Code of Conduct for United States Judges, National Association of Administrative Law Judges Model Code of Conduct for State Administrative Law Judges, and state judicial codes of conduct. *See, e.g.*, JUDICIAL CONFERENCE OF THE UNITED STATES, CODE OF CONDUCT FOR UNITED STATES JUDGES (2009), *available at* http://www.uscourts.gov/library/codeOfConduct/Code_Effective_July-01-09.pdf; NATIONAL ASSOCIATION OF ADMINISTRATIVE LAW JUDGES, MODEL CODE OF JUDICIAL CONDUCT FOR STATE ADMINISTRATIVE LAW JUDGES, XVI J. NAALJ 279 (1994). Many of these codes are themselves modeled on the ABA Model Code or the NCALJ model codes. It is also worth noting that NAIJ, in response to the publication of the proposed Codes, drafted and proposed its own code of conduct for EOIR's consideration, also based on the ABA Model Code. *See* Marks, *supra* note 9, at 14 n.71.

256 NATIONAL CONFERENCE OF THE ADMINISTRATIVE LAW JUDICIARY, MODEL CODE OF JUDICIAL CONDUCT FOR FEDERAL ADMINISTRATIVE LAW JUDGES (1989).

257 NATIONAL CONFERENCE OF THE ADMINISTRATIVE LAW JUDICIARY, MODEL CODE OF JUDICIAL CONDUCT FOR STATE ADMINISTRATIVE LAW JUDGES (1995).

258 The NCALJ model codes for federal and state ALJs are based on the 1972 and 1990 versions of the ABA Model Code, respectively. The ABA Model Code underwent a major revision in 1990 and has been amended multiple times since then, most recently in 2007.

259 While these model codes for ALJs were adopted by the NCALJ, they were never formally adopted by the ABA House of Delegates.

260 *See, e.g.*, ABA ANNOTATED MODEL OF CODE OF JUDICIAL CONDUCT (2004) (containing over 400 pages of annotations and discussion of the ABA Model Code).

261 *See* Codes of Conduct for the Immigration Judges and Board Members, 72 Fed. Reg. at 35,511 (quoting Canon IX).

orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so.[262]

The ABA Model Code also includes commentary that adds, "[f]acial expression and body language, in addition to oral communication, can give . . . an appearance of judicial bias."[263]

Many relevant canons from the ABA Model Code are not included at all in EOIR's proposed codes. For example, Canon 3C(3) of the ABA Model Code addresses judges with supervisory power over other judges.[264] EOIR's proposed Codes of Conduct provide no similar guidance for the CIJ or ACIJs. Other areas of weakness in the proposed Codes of Conduct, such as treatment of *ex parte* contacts and enforcement mechanisms, are more fully addressed in the ABA Model Code. The proposed Codes of Conduct are lacking in guidance by comparison.

This is not to suggest that the ABA Model Code should be adopted wholesale and without modification. As noted above, there are a number of provisions that are generally inapplicable to or inappropriate for immigration judges, such as canons regarding juries. In addition, there are aspects of adjudication in the immigration context that are not fully addressed by the ABA Model Code.[265] For instance, the definitions of and commentary regarding "bias" and "prejudice" could be enhanced even further to take into account the central role that cultural differences can play in immigration proceedings.[266] Another area that may require additional attention is the unique role that immigration judges play in developing the evidentiary record.[267]

The adoption and adaptation of the ABA Model Code for immigration judges would address the concerns with immigration judge behavior and temperament (discussed above in Section III.A.2.c).

A new code of conduct could be implemented at the agency level through rulemaking or via congressional legislation. In either case, ample opportunity for public input should be provided. EOIR attracted significant criticism for withdrawing the proposed Codes of Conduct from the formal rulemaking process (thus cutting off the opportunity for public comment).[268] A return to the rulemaking process, congressional debate, or some other public process (such as consideration and formal adoption of a model code by the ABA) would allow input from significant stakeholders, including attorneys practicing before the courts and the immigration judges themselves via the NAIJ, and enhance the legitimacy of the final product.

3. Implement Judicial-Model Performance Reviews for Immigration Judges

As discussed in Section II.C.3.b above, former Attorney General Gonzales included performance evaluations of immigration judges among his 22 proposed reform measures.[269] In light of DOJ's position that immigration judges are merely "adjudicatory employees,"[270] Attorney General Gonzales proposed annual reviews similar to the performance appraisals used elsewhere within DOJ.[271]

---

262 *See* ABA Model Code, *supra* note 254 (emphasis added).

263 *Id*. Similarly, Canon 3E of the ABA Model Code addresses disqualification with eight separate subparts, while Canon XVI of the proposed Codes of Conduct simply states "[a]n immigration judge shall follow judicial precedent and agency policy regarding recusal . . . ." *Compare* ABA Model Code, *supra* note 254, *with* Codes of Conduct for the Immigration Judges and Board Members, 72 Fed. Reg. at 35,511. Notably, DOJ's Office of Government Ethics described Canon XVI as "potentially misleading" in its generality. *See* Letter from Robert Cusick, Dir., Office of Gov't Ethics, Dep't of Justice to Hon. Paul McNulty, Dep. Attorney General, Dep't of Justice, and Kevin Chapman, Acting General Counsel, EOIR, DOJ (July 16, 2007), *available at* http://trac.syr.edu/immigration/reports/210/include/10-Code_of_Conduct_comments_OGE.pdf.

264 *See* ABA Model Code, *supra* note 254.

265 *See, e.g.*, Benedetto, *supra* note 152, at 503-08 (comparing and contrasting the ABA Model Code to the proposed Codes of Conduct).

266 *Id.*

267 *Id.* at 504.

268 *See, e.g.*, TRAC Progress Review, *supra* note 136 (reporting NAIJ's concern over the lack of transparency in the process of updating the EOIR Ethics Manual).

269 *See* Attorney General Reform Measures, *supra* note 6, at 1.

270 *See* NAIJ Letter to Margolis, *supra* note 86.

271 *See* Attorney General Reform Measures, *supra* note 6, at 1.

While Attorney General Gonzales claimed that the proposal "fully recogniz[es] [an immigration judge's] role as an adjudicator,"[272] critics worry that such a civil service model would further erode the decisional independence of the immigration judges.[273] In recognition of these concerns, we instead recommend a judicial performance review model based on the ABA's Guidelines for the Evaluation of Judicial Performance (the "ABA Guidelines")[274] and the model for judicial performance evaluation proposed by the Institute for Advancement of the American Legal System ("IAALS").[275]

Although both the ABA Guidelines and the IAALS model are targeted primarily at state judiciaries, they are useful models for the evaluation of immigration judges. Both stress judicial improvement as the primary goal, emphasize process over outcomes, and place a high priority on maintaining judicial integrity and independence.[276] The ABA Guidelines, first adopted in 1985 and updated in 2005, outline the essential characteristics of a judicial performance evaluation program. These include the following:

- Evaluation programs should focus on promoting judicial self-improvement, enhancing the quality of the judiciary as a whole, and improving the design of continuing education programs. (Guidelines 2.1 and 2.2)
- Evaluation programs should not be used for judicial discipline. (Guideline 2.3)
- Dissemination of data and results from evaluations should be consistent with the above uses, and data and results should otherwise be confidential. (Guideline 3.1)
- Evaluation programs should operate through independent, broadly based, and diverse committees, consisting of members from the bench, the bar, and the public, as appropriate. (Guideline 4.2)
- Evaluation programs should be free from political, ideological, and issue-oriented considerations. (Guideline 4.4)
- Judges should be evaluated on legal ability, integrity and impartiality, communication skills, professionalism and temperament, and administrative capacity. (Guidelines 5.1 through 5.5)
- Expert competence should be used in developing methods for evaluating judges, and collecting and analyzing data. Behavior-based instruments should be used. (Guidelines 6.2 and 6.3)
- Multiple, reliable sources should be used, including attorneys, litigants, witnesses, non-judicial court staff, and appellate judges. (Guideline 6.5)
- Judges should be evaluated periodically, with the frequency dependent on factors such as length of tenure. (Guideline 6.8)

The IAALS model builds on these principles and provides more detailed recommendations based on lessons learned from state judicial performance review programs.[277] For example, IAALS recommends, among other things, that: judges with no set terms should be evaluated once every three years; the evaluation committee should reflect a balance of attorneys and non-attorneys and political or other relevant constituencies; benchmarks and minimum standards should be set before any evaluations are performed and variances from these standards should be permitted only in extraordinary circumstances; judges should be observed in the courtroom, whether by the committee

272 *Id.*

273 *See, e.g.*, National Association of Immigration Judges, Immigration Court Needs: Priority Short List (November 2008), at 1 [hereinafter NAIJ Short List] (on file with the American Bar Association Commission on Immigration).

274 ABA, GUIDELINES FOR EVALUATION OF JUDICIAL PERFORMANCE (2005), *available at* http://www.abanet.org/jd/lawyersconf/pdf/jpec_final.pdf. [hereinafter ABA GUIDELINES].

275 *See* INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, SHARED EXPECTATIONS: JUDICIAL ACCOUNTABILITY IN CONTEXT (2006), *available at* http://www.du.edu/legalinstitute/publications2006.html [hereinafter SHARED EXPECTATIONS]; INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, TRANSPARENT COURTHOUSE: A BLUEPRINT FOR JUDICIAL PERFORMANCE EVALUATION (2006), *available at* http://www.du.edu/legalinstitute/publications2006.html [hereinafter BLUEPRINT].

276 *See generally* ABA GUIDELINES, *supra* note 274; SHARED EXPECTATIONS, *supra* note 275. For a discussion of adapting the IAALS model to the federal judiciary, *see* Rebecca Love Kourlis and Jordan M. Singer, *A Performance Evaluation Program for the Federal Judiciary*, 86 DENV. UNIV. L. REV. 7 (2008).

277 *See* SHARED EXPECTATIONS, *supra* note 275, at 59-61; BLUEPRINT, *supra* note 275.

directly or via trained independent observers; data collection should be conducted by a body independent of the committee; comprehensive and clear evaluation reports should be provided to each evaluated judge; and judges should be teamed with mentors to develop improvement strategies after being evaluated.[278] In addition to the above guidelines and recommendations, both the Lawyers Conference of the ABA's Judicial Division (the body responsible for drafting the ABA Guidelines) and the IAALS provide model survey instruments and other materials for use in developing performance review systems.[279]

A performance review system based on the guidelines and recommendations discussed above would address both the concerns raised regarding the quality of immigration judges and the reservations of the immigration judges and others related to preserving judicial independence. One telling line of evidence that supports the effectiveness of performance reviews based on the ABA Guidelines and the IAALS model is feedback from the judges themselves. In surveys of judges subject to performance reviews in four state systems, the majority of judges agreed that the evaluations provided useful feedback on their performance and that the evaluation process made them appropriately accountable for their job performance.[280] Similarly, federal district, magistrate, and bankruptcy judges participating in a pilot performance review system in the Central District of Illinois rated the value of the program as "overwhelmingly positive."[281] In addition, in a survey of Colorado judges subject to a robust performance evaluation system, over two-thirds of the judges felt that the evaluations either had no effect or a positive effect on judicial independence.[282]

While we recommend performance reviews of immigration judges based on the ABA Guidelines and the IAALS model, we refrain from making more detailed recommendations as to the specific elements of the performance review systems (such as particular benchmarks, etc.). Both the ABA Guidelines and the IAALS model recognize that the specifics of a performance evaluation must be tailored to each judicial system.[283] Factors such as how judges are initially selected, whether they are subject to reappointment, and whether they are subject to other types of supervision all impact decisions on the make-up of the committee, the frequency and scope of review, and the extent of dissemination of results. As such, full implementation of performance reviews may need to wait until other proposed reforms have been put in place. As the ABA Guidelines note, however, evaluation programs may be effectively implemented in stages and, in any event, should maintain the flexibility needed to adapt as necessary.[284]

While predicting the costs of performance reviews is difficult, estimates derived from state systems are available and suggest that costs would be relatively minor. For example, in Alaska where approximately 10 to 30 judges are evaluated each election cycle, expenses range from $2,000 to $4,000 per judge evaluated, with roughly an equal investment in staff time.[285] Similarly, Virginia spends approximately $5,000 per judge for its judicial performance evaluation program.[286] Using this last figure and assuming approximately one-third of the current immigration judge corps is evaluated each year, the estimated cost would be approximately $400,000 per year.

278 *See* SHARED EXPECTATIONS, *supra* note 275, at 79-93.

279 *See, e.g.*, ABA Judicial Division's Lawyer Conference, Judicial Performance Resources, http://www.abanet.org/jd/lawyersconf/performanceresource/survey/home.html (last visited Nov. 3, 2009); BLUEPRINT, *supra* note 275, at apps. C-I.

280 Rebecca L. Kourlis and Jordan M. Singer, *Using Judicial Performance Evaluations to Promote Judicial Accountability*, 90 JUDICATURE 200, 203 (2006).

281 *Id.*

282 Kourlis et al., *Performance Evaluation Program, supra* note 276, at 20.

283 *See generally* ABA GUIDELINES, *supra* note 274 (providing general guidelines and alternatives rather than specific recommendations); BLUEPRINT, *supra* note 275, at 59 (noting that evaluation programs can be shaped in many different ways to meet the specific needs of a court system).

284 ABA GUIDELINES, *supra* note 274 (Guideline 4.4).

285 Kourlis et al., *Performance Evaluation Program, supra* note 276, at 25.

286 *Id.*

4. Make the Disciplinary Process for Immigration Judges More Transparent and Independent

As discussed above in Section III.A.4.b, clarity and accountability are essential to a successful disciplinary system for immigration judges.[287] To achieve these goals, we recommend establishing a new, more independent and transparent system to manage complaints and the disciplinary process. The key components of such a system include segregating the disciplinary function from other supervisory functions, establishing and following publicly available procedures and guidelines for complaints and discipline, and fully implementing a formal right of appeal/review for adverse disciplinary decisions.[288]

Segregation of the responsibility for discipline into an independent or semi-independent body or office would benefit the immigration courts in several ways. First, in bypassing persons in the direct chain of supervision (ACIJs and the CIJ), personal conflicts of interest could be avoided, and supervisors would be able to focus on proactive improvement rather than reactive discipline. Second, a distinct and centralized body would provide a more neutral venue for potential complainants to present their claims, thereby ensuring equal consideration of all complaints, protecting anonymity where appropriate, and reducing the possibility of "retaliation" by immigration judges (particularly against practitioners who may appear before a particular judge frequently). While such segregation could potentially be achieved via a fully independent body,[289] we believe that political and administrative efficacy concerns favor creation of a semi-independent body or office within EOIR.[290]

All formal complaints against immigration judges, whether from litigants, practitioners, DHS attorneys, other immigration judges, BIA members, court of appeals judges, or others, should be made directly to the new office. The clarified and strengthened Codes of Conduct (as recommended above) should be the governing standard, and all complaints should be based on alleged violations of the Codes of Conduct.[291] To provide guidance for immigration judges and complainants, the new office should establish an advisory board to issue interpretations of the Codes of Conduct.[292] Complaints relating directly to the merits of an immigration judge's decision or procedural ruling should not be entertained. These and other procedures that may be adopted should be widely publicized; the procedures and other relevant information (including the Codes of Conduct) should be made available on EOIR's website, in the Immigration Court Practice Manual, and in materials used in the Legal Orientation Program, among other places.

All complaints would be reviewed by the office, and, if found to be non-frivolous, investigated, either through trained staff or specially convened panels.[293] Upon the completion of the investigation, the office (or the panel, if applicable) could dismiss the complaint, resolve the complaint through alternative dispute resolution (if appropriate), or take private or public

---

287 *See, e.g.*, Benedetto, *supra* note 152, at 505-511; NAIJ Short List, *supra* note 273, at 4.

288 It should be noted that the NAIJ advocates a complaint and disciplinary procedure modeled on the process used for federal judges, codified at 28 U.S.C. §§ 351-364, a system with many similar features, including public, codified procedures and opportunity for appeal. NAIJ Short List, *supra* note 273, at 4.

289 For example, in the District of Columbia, the authority to suspend or remove judges is vested in an independent body, the Commission on Judicial Disabilities and Tenure. *See* D.C. CODE § 11-1521.

290 Such an office could be modeled on the proposal of the American Immigration Lawyers Association to create an Office of Professional Responsibility at the EOIR level, specifically charged with discipline of immigration judges and BIA members via specially convened review panels. *See* AILA Draft Legislation, *supra* note 130.

291 *See, e.g.*, Benedetto, *supra* note 152, at 519-20.

292 *See, e.g.*, THE JUDICIAL CONDUCT AND DISABILITY ACT STUDY COMM., IMPLEMENTATION OF THE JUDICIAL CONDUCT AND DISABILITY ACT OF 1980: A REPORT TO THE CHIEF JUSTICE 110 (2006), *available at* http://www.supremecourtus.gov/publicinfo/breyercommitteereport.pdf (recommending that the Judicial Conference authorize the Committee to Review Circuit Council Conduct and Disability Orders to provide advice and counsel to chief circuit judges and judicial councils regarding implementation of the Judicial Conduct and Disability Act).

293 *See, e.g.*, AILA Draft Legislation, *supra* note 130 (recommending specially convened six-member conduct review panels). Based upon the initial review, the office could dismiss complaints without further investigation if such complaints are "frivolous, lacking sufficient evidence to raise an inference that misconduct has occurred, or containing allegations which are incapable of being established through investigation" or plainly "lack any factual foundation or are conclusively refuted by objective evidence," standards used in review of complaints against federal judges. *See* 28 U.S.C. § 352(b)(1).

disciplinary action.[294] In staffing the office or appointing panels, diversity should be emphasized to ensure representation of the various interested constituencies, and to lessen the effects of partisanship and bolster the impartiality of the office as a whole.[295] Upon a final adverse decision, an immigration judge should be allowed to appeal the decision to the Merit Systems Protection Board,[296] and in no event should discipline involving removal or loss of pay or grade be made effective prior to the resolution of such appeal.

All investigations and disciplinary proceedings should be documented by a written record. These records, while not generally made public, would be available in an appeal by an immigration judge.[297] In addition, decisions in appeals to the Merit Systems Protection Board would be published in accordance with its established procedures.[298] Further, such records could provide the basis of statistical or other summary reporting of disciplinary actions to the public.

The benefits of the structure outlined above include the use of a semi-independent body; clear, established, and publicly available standards and procedures; the opportunity for appeal by the affected immigration judge; and the public availability of the results of the process, either in the form of public disciplinary actions or summary reporting. A semi-independent disciplinary body, as outlined here, should be implemented via congressional legislation, as the entities involved should be limited in their ability to modify the system to ensure its integrity.

C. Recommended Changes to the Administration and Procedures of the Immigration Courts

1. Request Additional Immigration Judges and Support

As discussed above in Section III.A.1, the immigration courts are underfunded and understaffed in all areas. We join many other commentators and recommend that Congress provide additional funding for more immigration judges, law clerks, and other support staff, regardless of any structural reforms that may be implemented.

It is difficult to determine with precision how many additional immigration judges are needed to create significant improvements in the quality of adjudications, while at the same time permitting time for administrative duties and additional training.[299] Any increase in the immigration judge ranks would no doubt lead to some improvement.[300] But we believe

294 Alternatively, the office or panel could be given the power to make recommendations only, leaving ultimate authority to the CIJ, the Chair of the BIA, or some other delegate of the AG (or solely with the AG). *See* AILA Draft Legislation, *supra* note 130 (proposing that ultimate authority be vested in the CIJ); Benedetto, *supra* note 152, at 520 (suggesting appeal to the Office of the AG, who holds ultimate responsibility for the immigration judges).

295 *See, e.g.*, Benedetto, *supra* note 152, at 522 (suggesting that her proposed Ethics Review Board consist of a "variety of members," including practitioners or advocates from both sides of the immigration debate, and/or attorneys from DOJ's Office of Government Ethics); AILA Draft Legislation, *supra* note 130 (providing for disciplinary review panels consisting of a randomly selected immigration judge, a randomly selected BIA member, two administrators, one DHS attorney and one member of the private bar); D.C. CODE § 11-1522 (mandating one non-attorney, at least one attorney, and an active or retired federal judge as members of D.C. Commission on Judicial Disabilities and Tenure). In addition, appointment authority could potentially be divided between OCIJ, the BIA, DHS, DOJ, or possibly other interested parties such as the ABA. *See, e.g.*, D.C. CODE § 11-1522 (dividing appointment authority for the D.C. Commission on Judicial Disabilities and Tenure between the President of the United States, the mayor of D.C., and the Chief Judge of the U.S. District Court for the District of Columbia). An alternative approach for mitigating partisan influence is the use of a fully independent body. For example, members, officers and employees of the federal and D.C. governments are expressly disqualified from membership on the D.C. Commission on Judicial Disabilities and Tenure. *See* D.C. CODE § 11-1522(c).

296 Immigration judges currently may only appeal removal decisions to the Merit Systems Protection Board. *See* Legomsky, *Deportation and the War on Independence*, *supra* note 102, at 374.

297 *See, e.g.*, 28 U.S.C. § 360 (providing for confidentiality of all records of proceedings related to investigations of misconduct of federal judges, except to the extent released to the complainant or the judge under investigation, or as necessary for further investigations and proceedings). Notably, written orders implementing disciplinary action against federal judges are made available to the public. *See id*. § 360(b). In contrast, public notifications of disciplinary action against California state judges are only issued when the action involves removal, "public admonishment," or "public censure." *See* State of Cal. Comm'n on Judicial Performance, The Complaint Process, http://cjp.ca.gov/index.php?id=24 (last visited Nov. 3, 2009).

298 *See* 5 C.F.R. Part 1201 (practices and procedures of the Merit Systems Protection Board); U.S. MERIT SYS. PROT. BD., JUDGES' HANDBOOK 52-59 (2007), *available at* http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=241913&version=242182&application=ACROBAT.

299 Most of the people we interviewed did not express an opinion on how many additional immigration judges should be appointed. One proposed at least a 50% increase, another proposed doubling the ranks of immigration judges, and a third suggested that at least 100 additional judges are needed.

300 For instance, in responses to a GAO survey, 84% of immigration judges who responded said that adding additional judges to their courts would greatly or moderately improve the ability of immigration judges to carry out their responsibilities. CHALLENGES REMAIN, *supra* note 157, at 125.

that a major increase in the number of immigration judges is necessary in order to achieve significant improvements.

Hiring additional immigration judges would have many benefits, including, first and foremost, reducing the caseloads per judge. The goal would be to give the judges enough time to make use of administrative time for additional training and networking with other judges, to provide written opinions, and to do research and fully consider all important aspects of cases, which in turn should lead to better decisions that are based on more sound reasoning.

One method of analyzing how many additional immigration judges are needed is to compare the caseloads per immigration judge with the caseloads per judge in other administrative adjudicatory systems.[301] For instance, in Fiscal Year 2008, the Board of Veterans' Appeals's 60 Veterans Law Judges issued 43,757 decisions, for an average of 729 decisions per judge.[302] The majority of these decisions were issued without hearings, however, and during the same time period, the Board of Veterans' Appeals conducted only 10,652 hearings, or approximately 178 hearings per Veterans Law Judge.[303]

In Fiscal Year 2007, 1,006 Social Security Administration ("SSA") administrative law judges disposed of 547,951 hearings, for an average of 544 hearings per ALJ.[304] SSA's goal is for judges to issue 500 to 700 "legally sufficient" decisions each year.[305] Immigration judges, by comparison, are currently issuing over 1,000 decisions per judge each year.[306] Notably, this figure does not include proceedings in immigration courts that were resolved without a decision, such as transfers, venue changes, and administrative dismissals, or dispositions of other matters, such as bond redeterminations and motions.[307]

In order to bring the number of decisions issued per judge down to the highest current level among Veterans Law Judges and SSA administrative law judges (approximately 700 per year), assuming the total level of immigration court decisions continues at approximately 229,000 per year, EOIR would need to employ 328 immigration judges.[308] In other words, the ranks of immigration judges would need to expand by 97 judges. With an additional 100 judges, the immigration courts could handle a slight increase in decisions to approximately 231,700 per year.

---

301 One commentator has also compared the caseloads of immigration judges to federal district court judges. *See* Russell Wheeler, Brookings Institution, Seeking Fair and Effective Administration of Immigration Laws 3 (2009) (noting that federal judges disposed of an average of 480 cases per judge in 2008, only 27 of which were trials or trial-like proceedings (e.g., sentencing hearings)).

302 Bd. of Veterans' Appeals, Fiscal Year 2008 Report of the Chairman 3 (Feb. 23, 2009), *available at* http://www.va.gov/Vetapp/ChairRpt/BVA2008AR.pdf.

303 *Id.*

304 U.S. Social Security Administration, Annual Statistical Supplement 2008 2.F (2009), *available at* http://www.ssa.gov/policy/docs/statcomps/supplement/2008/index.html. Although final statistics for Fiscal Year 2008 are not yet available, Frank Cristaudo, the Chief Administrative Law Judge of the Office of Disability Adjudication and Review at the Social Security Administration, reported in September 2008 that "nearly 1,200 Administrative Law Judges . . . issue more than 550,000 decisions a year" for an average of approximately 458 per ALJ. *Social Security Testimony Before Congress Before the Subcomm. On Social Security of the H. Comm. On Ways and Means*, 110th Cong. (2008) (statement of Frank A. Cristaudo, Chief Administrative Law Judge, Office of Disability Adjudication and Review at the Social Security Administration), *available at* http://www.ssa.gov/legislation/testimony_091608.htm [hereinafter *Cristaudo Testimony*].

305 *Cristaudo Testimony*, *supra* note 304.

306 Over 229,000 decisions were issued in FY 2008, while the number of immigration judges with regular caseloads during that year ranged from 205 to 214. *See* EOIR FY 2008 Statistical Year Book, *supra* note 1, at B2 (noting that 229,316 decisions were issued in FY 2008); TRAC, Immigration Report, Number of Immigration Judges, 1998 -2009, http://trac.syr.edu/immigration/reports/208/include/payroll.html (last visited Nov. 3, 2009).

307 Including decisions and other dispositions, 281,041 proceedings were completed in FY 2008, or over 1,300 completions per judge. EOIR FY 2008 Statistical Year Book, *supra* note 1, at D1 (assuming 214 judges). If all matters are considered, including proceedings, bond redeterminations, and motions, immigration judges completed 339,071 matters in FY 2008, or over 1,500 matters completed per judge. *Id.* at B7 (assuming 214 judges).

308 Another method to estimate the number of immigration judges needed is the Delphi method, a predictive iterative analytical method that relies on a panel of independent experts answering targeted questionnaires regarding the organization's needs. *See* Rand Corp. The Delphi Method: An Experimental Study of Group Opinion (June 1969). The Delphi method has been used by other organizations and courts to assess judicial needs. *See, e.g.*, National Center for State Courts, Assessing the Need for Judges and Court Support Staff (2006) (explaining use of Delphi technique for assessing state and local court needs); Federal Judicial Center, 2003-2004 District Court Case-Weighting Study (2004) (using a variation of the Delphi method for weighted caseload statistics for the district courts); Inst. For Court Management, Measuring the Need for Judges: Rationalizing the Allocation of Judicial Resources (May 2000) (estimating judicial needs for the state of Idaho).

Such an increase in the number of immigration judges would require a significant budget increase for EOIR. In its FY 2010 budget request, EOIR has already requested 28 new immigration judge positions, at a cost of $185,000 per position.[309] Based on this cost estimate, hiring 100 additional immigration judges would cost approximately $18.5 million for the initial year.[310]

The lack of adequate numbers of immigration judges is a serious problem that affects the quality of adjudication and the health and satisfaction of the adjudicators, and it should be remedied as soon as possible. Therefore, we recommend that funding be made available to increase the number of immigration judges from 231 to approximately 331 as soon as possible.[311] While it may not be practical to implement such an increase within a single year, we recommend that all 100 new judges be hired within three to four years.

We also recommend that EOIR request funding sufficient to hire additional support staff that would, at a minimum, keep pace with the increase in the number of immigration judges. In particular, as discussed above in Section III.A.1, there is an immediate need for many new law clerk positions. The current ratio of immigration judges to law clerks is almost four to one. Some commentators have suggested that each immigration judge should have at least one law clerk, and that the utility of additional clerks will be limited until this threshold ratio is reached.[312]

Adding enough law clerks to reach the level of one clerk per judge, based on the current number of immigration judges, would entail hiring an additional 169 law clerks; and, if the number of judges is increased to 331, it would entail hiring an additional 269 law clerks.[313] In its FY 2010 budget request, EOIR has already requested an additional 28 law clerk positions, at a cost of $70,000 per position.[314] Based on this cost estimate, hiring an additional 269 law clerks would cost approximately $18.8 million in the initial year.[315]

2. Require More Written, Reasoned Decisions

As noted above in Section III.B.1, the issuance of oral decisions in immigration proceedings can have a significant negative impact on the quality of decisions and the quality of subsequent BIA and judicial review. Therefore, we recommend that more formal written decisions should be required, particularly in proceedings, such as asylum cases, where the complexity of the underlying record requires more thoughtful consideration than can be given during the actual hearing.[316] Immigration judges should at a minimum produce written decisions that are sufficiently clear to allow respondents and their counsel to understand the bases of the decision and to permit meaningful BIA and appellate review.

With the additional resources and reforms we recommend in this Section IV.C, an increase in the number of written decisions should not be overly burdensome on the immigration court system. In particular, reduced dockets, additional administrative time, and the availability of dedicated law clerks would dramatically improve the ability of immigration judges to produce reasoned written decisions. In addition, prompt and accurate transcription of the substantive proceedings would further assist immigration judges to review cases and prepare written decisions in a timely manner.[317]

---

309 U.S. Dep't of Justice, FY 2010 Congressional Budget Submission: Administrative Review and Appeals 25 (2009), *available at* http://www.justice.gov/jmd/2010justification/pdf/fy10-ara.pdf [hereinafter FY2010 Budget Request]. The $185,000 cost per immigration judge includes personnel compensation and benefits, contractual services and supplies and acquisition of assets associated with the position, including certain one-time startup costs. Interview with EOIR, Dec. 2009.

310 Given that the initial cost per immigration judge includes certain one-time start-up expenses, the cost per position may be slightly lower in subsequent years.

311 As noted, DOJ's FY 2010 budget request already includes an additional 28 immigration judge positions. FY2010 Budget Request, *supra* note 309, at 18.

312 *See* AILA Draft Legislation, *supra* note 130; Lustig et al., *Inside the Judges' Chambers*, *supra* note 77, at 68 (quoting immigration judges as recommending that "each judge have a junior law clerk" and noting that a judge "could keep a junior law clerk busy full time").

313 As of November 2009, EOIR reported 62 law clerks. Interview with EOIR, Nov. 2009.

314 FY2010 Budget Request, *supra* note 309, at 25.

315 Given that the initial cost per law clerk includes certain one-time start-up expenses, the cost per position may be slightly lower in subsequent years.

316 This recommendation should be implemented through a rulemaking or legislation that provides clear guidelines for determining when a written decision would be required and that includes a mechanism for the parties to request a written decision.

317 While EOIR has made significant progress in decreasing the turnaround time for transcripts, quality concerns persist. *See, e.g.*, Troubled Institution, *supra* note 241 (reporting that, according to NAIJ, the "major problem with transcripts is the poor quality" and that recent improvements in speed may in fact be contributing to quality problems).

3. Increase Administrative Time Available to Immigration Judges

Without additional administrative time becoming available to immigration judges during which they could take advantage of training and professional development resources, improvements to these resources would be ineffective.[318] If the caseloads of immigration judges are successfully decreased by hiring more judges and they are assisted by more law clerks, a greater portion of each judge's time could be designated as administrative time and used as such. Furthermore, participation in live trainings such as the annual conference for immigration judges (discussed in Section II.C.2 above) would be more feasible. Increased administrative time also would permit immigration judges more time to interact with other immigration judges on their courts or immigration judges from other courts. Among other things, judges could be encouraged to attend weekly or monthly lunch meetings to discuss their cases or new developments in immigration law.

4. Provide Additional Training and Support for Immigration Judges

Some commentators have recommended that increased funding be available for professional development, training, and support of immigration judges and support staff.[319] Any increased funding will be more effective if it is designated to include in-person experiences for both newly hired judges and veterans of the bench.

In terms of the substance of trainings, many immigration judges have expressed a need for more training in assessing credibility, identifying fraud, and understanding changes to U.S. asylum law.[320] Although a relatively low percentage of judges felt that sensitivity and cultural awareness training is needed,[321] the view that such training would lead to better decision making has been expressed by others.[322]

Many immigration judges have also indicated that informal meetings with other judges and opportunities to observe experienced judges in other courts would enhance their abilities to carry out their duties.[323] This could be accomplished with a minimum amount of effort or additional funding. A single administrator, for example, could serve as a liaison with local court administrators to help facilitate regular meetings among immigration judges at each court. Similarly, arranging for immigration judges to observe judges at other courts would involve some expense for travel, but would not involve a significant increase in staffing.

Therefore, we recommend that sufficient funding be made available to permit both newly hired and experienced immigration judges to participate in regular live, in-person trainings on a wide range of topics in immigration law. This training should include (without limitation) sessions on: (1) making credibility determinations across cultural divides; (2) identifying fraud; (3) changes in U.S. asylum law; and (4) cultural sensitivity.

We also recommend that an administrator be designated to facilitate increased communication among immigration judges, both within each court and among the various courts. This should involve both formal and informal meetings among immigration judges, as well as opportunities for immigration judges to observe other judges in their own courts or in other courts. Both of the above recommendations, of course, rely on the hiring of additional immigration judges, so that the decreased caseloads would permit judges to take advantage of additional training and networking opportunities.

In addition, in response to a widespread sentiment among immigration judges that they do not have adequate access to country conditions and human rights reports,[324] we recommend that DOJ and EOIR

---

318 TRAC Hiring Report, *supra* note 55; *Long Statement*, *supra* note 194, at 35.

319 *See, e.g.*, Human Rights First Blueprint, *supra* note 120, at 12.

320 Challenges Remain, *supra* note 157, at 131 (showing that 59% of respondents stated that assessing credibility training would greatly or moderately enhance their ability to adjudicate asylum cases, 73% of respondents stated that training in identifying fraud is needed, and 54% of respondents stated that training in changes to U.S. asylum law is needed).

321 *Id*. at 132.

322 *See, e.g.*, Vaala, *supra* note 157, at 1036.

323 *See* Challenges Remain, *supra* note 157, at 130-31 (showing that 85% of respondents felt that informal meetings with other immigration judges would enhance their ability to adjudicate cases and 63% of respondents felt that observing an experienced judge in another court would enhance their ability to adjudicate cases).

324 *See, e.g.*, *id*. at 125 (noting that 68% of respondents felt that access to the Asylum Program's Virtual Library would greatly or moderately improve their ability to adjudicate asylum cases).

develop and improve access to such information. This would help professionalize the decision-making process and may address disparities in adjudications to some degree. Since the Asylum Program at DHS has a Virtual Library and other electronic resources that already provide this information to asylum officers, DOJ should coordinate with the Asylum Program to create a mechanism such that this information is available to immigration judges as well.

5. Improve Data Collection and Analysis Regarding the Performance of Immigration Judges and Immigration Courts

As discussed above in Section III.A.4.a, GAO has identified shortcomings in EOIR's ability to collect and analyze empirical data regarding the performance of the immigration courts and immigration judges.[325] In response, GAO has recommended that EOIR develop and maintain appropriate procedures to accurately measure and ensure the accuracy of case completion data, identify and examine cost-effective options for acquiring the data and analytical expertise necessary to perform periodic multivariate statistical analyses of immigration judges' asylum decisions, and develop more sophisticated plans for assessing the resources and guidance needed for effective supervision of immigration judges.[326]

We endorse the GAO recommendations. Their implementation could be handled internally, but given the specialized nature of the resources and expertise required, it may be more appropriate to outsource the data collection, the analysis, or both.[327] The GAO reports did not provide cost estimates for these recommendations.

6. Integrate Technology into Immigration Courtrooms to Facilitate Fair and Efficient Proceedings

With respect to the proper role of technology in the courtroom, we recommend that priority be given to completing the rollout of digital audio recording systems,[328] while at the same time sharply limiting the practice of conducting hearings by videoconference.

a. Expand Digital Audio Recording Systems

As noted above in Sections III.B.2 and III.C, although former Attorney General Gonzales formally called for nationwide implementation of digital audio recording systems beginning in August 2006, commentators have observed that much remains to be done. For example, as of May 2009, digital audio recording systems had been installed in only 32 out of 54 immigration courts.[329] DOJ requested an additional $8.3 million to complete implementation and anticipated (with approval of the budget request) that these digital systems would be available nationwide by 2010.[330] Completion of this initiative, which involves technology that many immigration judges believe would improve their performance,[331] should be a high priority. One court administrator reported as early as 2000 that "integration of digital recording for Immigration Court proceedings will raise the quality level of recorded proceedings, reduce the 'human error factor' that is associated with audio recordings . . . provide a new feature of note taking for the Judge that will make review of case proceedings for legal research much more efficient and finally reduce the costs associated with transcription services and access of case information to the public."[332] In addition, digital audio

325 *See* GAO Report on Variation, *supra* note 54, at 62; Challenges Remain, *supra* note 157, at 74; GAO Caseload Report, *supra* note 49, at 30-31.

326 *Id.*

327 The GAO reports do not take a position on whether developing an in-house capability is preferable to outsourcing, or vice versa. In fact, one report specifically recommends that EOIR examine both options. GAO Report on Variation, *supra* note 54, at 62.

328 *See Ohlson Testimony*, *supra* note 50, at 3.

329 EOIR Improvements Update, *supra* note 7, at 4.

330 TRAC Progress Review, *supra* note 136.

331 Challenges Remain, *supra* note 157, at 124-125.

332 Patterson, *supra* note 226, at 4.

recording systems reduce the turnaround time and costs of transcriptions.[333] Expanded use of digital audio recording systems also promises to partly address immigration judges' concerns about shoddy transcription and incomplete records for BIA and subsequent appellate review.[334]

b. Limit the Use of Videoconferencing

In response to the issues discussed above in Section III.B.3, immigration courts should limit the use of videoconferencing to procedural hearings where no testimony is given, e.g., at master calendar and bond hearings, and where the respondent has knowingly and voluntarily consented to proceedings via videoconference.[335] EOIR has defended the use of videoconferencing in removal proceedings on the grounds that videoconferencing "does not change the adjudicative quality or decisional outcomes" and that hearings conducted in this format are "fair and fully protect the participants' right to procedural due process," emphasizing that there exists "a means of transmitting and receiving additional evidence between all locations and all participants."[336] However, as noted above in Section III.B.3, lawyers representing respondents and recent scholarship have sharply challenged these contentions. Indeed, as noted above, a study concluded that respondents participating in videoconference hearings are far less likely to prevail.[337] Based on these findings, but acknowledging the possible efficiencies of videoconferencing technology, the authors of the study counseled that videoconferencing should only be used (1) during master calendar hearings, since these are procedural in nature, often last less than 20 minutes, and mainly serve to identify the grounds for relief and to schedule a removal hearing; and (2) during bond hearings, which potentially benefit the respondent, do not implicate testimonial or other substantive matters, and should not be needlessly delayed simply to guarantee that the respondent can attend the hearing in person. Both of these proceedings are "straightforward and do not require the judge to engage in ambiguous credibility determinations."[338] Absent exigent circumstances, videoconferencing in these limited instances should also be used only with the knowing and voluntary consent of the respondent.

7. Make Greater Use of Prehearing Conferences

As discussed above in Section III.A.1, immigration judges have overwhelming caseloads, and time in the courtroom is at a premium. Federal regulations allow immigration judges to conduct prehearing conferences at their discretion. The relevant regulation states: "Pre-hearing conferences may be scheduled at the discretion of the Immigration Judge. The conference may be held to narrow issues, to obtain stipulations between the parties, to exchange information voluntarily, and otherwise to simplify and organize the proceeding."[339] Yet these prehearing conferences are rarely used by the immigration courts.[340]

---

333 *Id.* at 12. As noted above in Section IV.C.2, prompt turnaround of accurate transcriptions would significantly enhance the ability to immigration judges to issue written opinions.

334 *Id.* at 12-13 (noting that digital systems enhance the sound quality and improve the durability and accessibility of records).

335 *See* Walsh, et al., *supra* note 233, at 278-79. Alternatively, if substantive hearings continue to be conducted by videoconference, a preferred solution would be to provide the respondent and the respondent's counsel with private rooms and a dedicated private phone line — with a translator on the line, if necessary — so that they can communicate effectively during these proceedings. *See generally* Haas, *supra* note 228, at 17; Gleason, *supra* note 229.

336 *See* EOIR, U.S. Dep't of Justice, Office of the Director, Headquarters Immigration Court (HQIC) Fact Sheet (July 21, 2004), *available at* http://www.usdoj.gov/eoir/press/04/HQICFactSheet.pdf.

337 *See* Walsh, et al., *supra* note 233, at 271.

338 *See id.* at 278. Although it is possible that access to counsel would be improved through videoconferencing for respondents in remote locations, at least one commentator has expressed doubts about whether expanded videoconferencing would accomplish this goal since the remote respondents would still need to overcome the high hurdle of obtaining a lawyer in the first place. Interview with Stephen Yale-Loehr, Adjunct Professor of Law, Cornell University Law School.

339 8 C.F.R. § 1003.21(a) (formerly at 8 C.F.R. § 3.21(a)). When this rule was first promulgated, EOIR explained that, in addition to codifying existing practice, the section "provide[s] for prehearing conferences to be held in the discretion of the Immigration Judge for the purpose of narrowing issues, attaining stipulations between the parties, voluntarily exchanging information, or for any other purpose which might simplify, organize, and expedite the proceeding." Aliens and Nationality; Rules of Procedure for Proceedings Before Immigration Judges, 52 Fed. Reg. 2931, 2933 (Jan. 29, 1987). At that time, it was noted that "[c]omments were diverse on this section ranging from the position that pre-hearing conferences are unnecessary and cause delay to the opposite extreme that they be mandatory." *Id.*

340 APPLESEED, *supra* note 229, at 18.

We recommend that there should be a strong presumption in favor of immigration courts holding prehearing conferences in order to expedite subsequent proceedings, to narrow the issues, and to provide clearer guidance to respondents and their counsel on what evidence and testimony will be important.[341] Early instructions could be tailored to the kind of claim the respondent is making. Lawyers and respondents could plan accordingly to provide the sort of evidence and testimony that is important to the specific immigration judge in light of the particular claim, as opposed to being surprised to learn in an oral decision that the immigration judge was concerned that a specific piece of evidence is missing. Increased use of prehearing conferences thus has the potential to make the immigration adjudication process more efficient and run more smoothly.

Prehearing conferences also could serve as an opportunity to emphasize to lawyers their responsibility to handle immigration matters in a timely and professional fashion and to develop a reasonable timetable for all of the parties. Lawyers who are unprepared for merits proceedings or who simply fail to appear jeopardize their clients' cases and inject unnecessary delay.[342] To protect noncitizens' interests and to avoid such delays and last-minute requests for continuances and extensions, we also recommend that judges use prehearing conferences to make clear when and under what circumstances requests for extensions of time should be made.

341 The Appleseed report goes further and recommends mandatory prehearing conferences at the request of either party. *Id.* Nonetheless, the Appleseed report recognizes that there are cases where the conferences would be of little use, which accords with this Report's recommendation that there be a strong presumption in favor of the conferences if requested by either party, but that they not be mandatory.

342 *See, e.g.*, Hernandez-Gil v. Gonzales, 476 F.3d 803, 805 (9th Cir. 2007) (remanding an immigration case to the BIA where the immigration judge had proceeded to hold a merits hearing, even after the respondent had requested a continuance so that he could obtain the assistance of the lawyer he had retained for the case who had failed to appear).

3

Board of Immigration Appeals

Reforming the Immigration System

Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases

Prepared by Arnold & Porter LLP for the American Bar Association Commission on Immigration

American Bar Association
Commission on Immigration
740 Fifteenth Street, NW
Washington, DC 20005-1022
202-662-1005

Part 3: Board of Immigration Appeals
Table of Contents

I. Introduction on the Board of Immigration Appeals 3-3
II. Background on the Board of Immigration Appeals 3-4
A. Structure of the Board of Immigration Appeals 3-4
B. Standards Governing Adjudication by the Board of Immigration Appeals 3-6
1. The 1999 Streamlining Reforms 3-6
2. The 2002 Streamlining Reforms 3-7
3. The 2006 Attorney General's Measures to Improve the Immigration Courts and the Board of Immigration Appeals 3-8
4. The 2008 Proposed Streamlining Reforms 3-9
III. Issues Relating to the Board of Immigration Appeals 3-10
A. The BIA Delays Immigration Adjudication 3-10
B. Too Many Appeals Are Decided by Single Board Members 3-12
C. The BIA Issues Too Few Reasoned Opinions 3-13
D. Limits on the Board's Standard of Review Prevent it From Addressing Disparities Among Immigration Judges 3-15
E. Time Limits on Appellants and Board Members are Unduly Abbreviated 3-16
F. The BIA Does Not Generate Enough Precedent 3-17
G. The BIA Is Insufficiently Independent 3-20
H. The BIA Lacks Sufficient Resources to Deal with Its Caseload 3-21
I. Assessing the Harm 3-21
1. Appeals to Federal Courts 3-21
2. Reversal and Remand Rates 3-24
3. Current BIA Processes Appear to Favor the Government 3-26
4. Decisional Disparity Among Immigration Judges 3-27
IV. Recommendations Relating to the Board of Immigration Appeals 3-27
A. Require Three-Member Panel Review for Non-Frivolous Appeals 3-28
B. Improve the Quality of Board Decisions 3-29
1. Require that Written Decisions Respond to all Non-Frivolous Arguments Raised by the Parties 3-29
2. If Retained, Make Affirmances Without Opinions Discretionary Rather than Mandatory 3-29
C. Permit De Novo Review of Immigration Judge Factual Findings and Credibility Determinations 3-29
D. Relax Time Limits on Board Members 3-30
E. Encourage Publication of Precedent Decisions and Increase Access to Non-Precedent Decisions 3-30
F. Apply to Board Members the Code of Conduct Proposed for Immigration Judges in Part 2 of this Report 3-31
G. Increase the Resources Available to the Board 3-31

Part 3: Board of Immigration Appeals

I. Introduction on the Board of Immigration Appeals

The Board of Immigration Appeals ("BIA" or "Board") is the highest administrative body that interprets the immigration laws. The Board is currently part of the Executive Office for Immigration Review ("EOIR"), a component of the Department of Justice that operates under the authority and supervision of the Attorney General.[1] Regulations promulgated by the Attorney General give the Board jurisdiction to hear all appeals of removal and other decisions made by immigration judges, as well as of certain decisions by DHS staff.[2]

In carrying out its review function, the Board is responsible for resolving the questions before it in a manner that is timely, impartial, and consistent with the immigration laws.[3] Its role is also to provide clear and uniform guidance to DHS, immigration judges, and the public on the proper interpretation and administration of the immigration laws.[4] Thus, its decisions range from complex legal interpretations to nuanced matters of administrative discretion.[5] As the final administrative body charged with implementing the immigration laws, the Board also performs a number of functions in addition to appellate review, including assisting in the training of immigration judges and implementing and publicizing rules regarding the practice of attorneys before the administrative system.[6]

Although the Board (in one form or another) has served as the highest administrative review body for immigration decisions for many years, the standards governing the Board's appellate review have changed significantly over the last decade as a result of "streamlining" reforms implemented in 1999 (the "1999 Streamlining Reforms") and 2002 (the "2002 Streamlining Reforms").[7] These measures revised the structure and procedures of the Board in an attempt to reduce delays in administrative review, eliminate a mounting case backlog, and focus resources on those cases presenting the most significant legal issues.[8] The 1999 Streamlining Reforms enabled a single Board Member to affirm a decision of an immigration judge without opinion in a limited category of cases, while the majority of cases continued to be heard by three-member panels.[9] The 2002 Streamlining Reforms, however, essentially reversed this practice, dramatically expanding the categories of cases that were suitable for review by single members, and expanding the categories of cases in which affirmances without opinion were appropriate.[10] Because of these changes, nearly all cases reviewed by the Board in recent years have been decided by a single Board Member.[11] Furthermore, since only decisions issued by a three-member panel or the Board en banc may be considered for designation as precedent,[12] the vast majority of the Board's decisions are now unpublished. Although these unpublished decisions are binding on the parties, they do not serve as precedent; this low volume of

---

1 8 C.F.R. § 1003.1(a)(3); EOIR, Board of Immigration Appeals Practice Manual § 1.2(b) (2004) [hereinafter BIA Practice Manual], *available at* http://www.usdoj.gov/eoir/bia/qapracmanual/apptmtn4.htm.

2 8 C.F.R. §§ 1003.1(b), 1292.3. For a summary of those matters that the Board generally does (or does not) have authority to review, see BIA Practice Manual, *supra* note 1, § 1.4.

3 BIA Practice Manual, *supra* note 1, § 1.2(a).

4 *Id.*

5 *See generally* Daniel Kanstroom, *The Better Part of Valor: The REAL ID Act, Discretion, and the "Rule" of Immigration Law,* 51 N.Y.L. Sch. L. Rev. 161 (2006); Gerald Neuman, *Discretionary Deportation,* 20 Geo. Immigr. L. J. 611 (2006).

6 8 C.F.R. § 1003.1(d).

7 *See* Board of Immigration Appeals: Streamlining, 64 Fed. Reg. 56,135 (Oct. 18, 1999); Board of Immigration Appeals: Procedural Reforms to Improve Case Management; Final Rule, 67 Fed. Reg. 54,878 (Aug. 26, 2002).

8 *See* Press Release, Department of Justice, Board of Immigration Appeals: Final Rule (Aug. 23, 2003), *available at* http://www.usdoj.gov/eoir/press/02/BIARulefactsheet.pdf (last visited Jan. 29, 2009).

9 *See* Board of Immigration Appeals: Streamlining, 64 Fed. Reg. at 56,141.

10 *See* Board of Immigration Appeals: Procedural Reforms to Improve Case Management; Final Rule, 67 Fed. Reg. at 34,663.

11 *See* Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication,* 60 Stan. L. Rev. 295, 364 fig. 40 (2007). For an expanded version of the Refugee Roulette study, with commentary by scholars from Canada and the United Kingdom as well as from the United States, please see Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform (NYU Press 2009).

12 8 C.F.R. § 1003.1(g).

precedent limits the Board's traditional function of crafting greater uniformity in immigration law.[13]

In addition to simplifying the review process, the 2002 Streamlining Reforms also narrowed the Board's standard of review. Traditionally, the Board possessed the authority to conduct de novo fact finding and thus overrule the factual findings, and in certain cases the credibility determinations of immigration judges, without requiring a remand.[14] The 2002 Streamlining Reforms, however, eliminated this authority, narrowing fact and credibility determinations to a "clearly erroneous" standard of review.[15]

These changes have inspired much debate as to whether the BIA as currently structured adequately serves as an oversight and adjudicative body. Consequently, this Part examines the streamlining measures in detail, and analyzes the effects of those measures. It also addresses other criticisms that have been raised against the Board's current structure and practice, including arguments that the Board is insufficiently independent because of its location within the Department of Justice and lacks sufficient resources to handle its caseload adequately and fairly. After reviewing these concerns, this Part explores several options for reforms with respect to the Board and concludes with recommended changes.

II. Background on the Board of Immigration Appeals

A. Structure of the Board of Immigration Appeals

The Board was created in 1940 by regulation of the Attorney General as a component of the Department of Justice, independent of the Immigration and Naturalization Service ("INS").[16] Originally, the Board made the initial adjudication in deportation and exclusion cases, after reviewing the recommendation of an INS officer and the Commissioner.[17] The Board first began to resemble its current form under regulations implementing the Immigration and Nationality Act of 1952, which gave the Board appellate jurisdiction to review final deportation and exclusion decisions of immigration judges (then known as Special Inquiry Officers), as well as certain other decisions of immigration enforcement officials.[18]

In 1983, responding to claims that immigration judges needed to be perceived as more independent from INS, the immigration judges and the Board were both placed into a new entity within the Department of Justice, the Executive Office for Immigration Review ("EOIR").[19] The regulations creating EOIR established a Director of the Executive Office for Immigration Review, reporting to the Associate Attorney General, and a head for each adjudicatory unit—the Chief Immigration Judge, and the Chair of the Board of Immigration Appeals.[20] This structure remains intact today.

As a component of the Department of Justice, the Board operates under the authority and supervision of the Attorney General. Regulations give the Attorney General authority to appoint Board Members, and Board Members are Justice Department employees who act as "delegates" of the Attorney General in adjudicating appeals and serve at his or her pleasure.[21] Decisions of the Board are reviewable de novo by the Attorney General, who may vacate decisions of the Board and issue his or her own decisions as

13 For further discussion of precedential decisions, see *infra* Section III.A.6.

14 *See, e.g., In re* Burbano, 20 I. & N. Dec. 872, 873-74 (BIA 1994).

15 8 C.F.R. § 1003.1(d)(3)(i).

16 Immigration and Naturalization Service: Delegation of Powers and Definition of Duties, 5 Fed. Reg. 2,454 (July 3, 1940) (establishing a Board of Review of the Immigration and Naturalization Service under the supervision of the Special Assistant to the Attorney General in charge of the Immigration and Naturalization Service). The origins of the Board date back to the formation of a five-member advisory Board of Review within the Department of Labor created to assist the Secretary of Labor in immigration decisions. That entity reported to the Commissioner-General of Immigration, an enforcement official, and had both enforcement and judicial functions. The Board of Review's operations were criticized because of its mix of enforcement and quasi-judicial responsibilities, so when the Immigration and Naturalization Service was transferred to the Department of Justice in 1940, the BIA was created as an entity entirely separate from the enforcement functions of the INS. *See* Maurice A. Roberts, *The Board of Immigration Appeals: A Critical Appraisal*, 15 S.D. L. Rev. 1, 33-34 (1977).

17 *See* Roberts, *supra* note 16, at 34-35.

18 *See id.* at 35.

19 Board of Immigration Appeals; Immigration Review Function; Editorial Amendments, 48 Fed. Reg. 8,038 (Feb. 25, 1983). The reorganization became effective on February 15, 1983. *Id.*

20 8 C.F.R. § 1003.0(a).

21 *Id.* § 1003.1(a)(1) ("The Board Members shall be attorneys appointed by the Attorney General to act as the Attorney General's delegates in the cases that come before them.").

substitutes.[22] Decisions of the Attorney General may also be published as precedent decisions.[23] While this authority to vacate and overrule is rarely used, it has garnered attention recently after former Attorney General Michael Mukasey overturned several long-standing Board opinions (subsequently reinstated by Attorney General Eric Holder) regarding ineffective counsel and other legal issues at the close of the Bush Administration in December of 2008.[24] Furthermore, the very existence of the Board is subject to the rulemaking authority of the Attorney General.[25] As the Board is solely a creation of regulation, it can be further reformed, or even abolished, by rule, after a notice and comment period.[26]

The size of the Board also has fluctuated over time, although the most frequent revisions in its authorized membership have occurred over the last 16 years in response to increasing caseload. The 1983 regulations established a five-member Board, with a Chairman who had the authority to designate an assistant to act in his or her absence.[27] Since then, the number of BIA members has varied from as few as five to as many as 23.[28] Recent regulations provide for 15 members, including the Chairman and Vice Chairman.[29] The Director of EOIR may also designate Temporary Board Members for terms not to exceed six months.[30] This system of designating Temporary Board Members allows the Board to more flexibly respond to increases or changes in the number, size, or type of cases before it.[31]

Currently, a staff of about 120 attorneys, structured as teams, also assists Board Members in reviewing decisions appealed to the Board. The Board is structured as four panels: one serves a screening function and decides whether cases are suitable for

22 *Id.* § 1003.1(d)(1)(i); *id.* § 1003.1(h).

23 BIA PRACTICE MANUAL, *supra* note 1, § 1.4(g).

24 *See, e.g.*, *In re* Compean, 24 I. & N. Dec. 710 (BIA Jan. 7, 2009) (right to effective assistance of counsel) *vacated by In re* Compean, 24 I. & N. Dec. 1 (BIA June 3, 2009); *In re* Silva-Trevino, 24 I. & N. Dec. 687 (A.G. 2008) (determination of whether a prior conviction is a crime involving moral turpitude).

25 Board of Immigration Appeals: Procedural Reforms to Improve Case Management; Final Rule, 67 Fed. Reg. 54,878, 54,883 (Aug. 26, 2002) ("As one court has noted, the Attorney General could dispense with Board review entirely and delegate his power to the immigration judges, or could give the Board discretion to choose which cases to review.").

26 The Homeland Security Act of 2002 provides some statutory acknowledgement of the Board in a short section affirming the existence of the Executive Office for Immigration Review. *See* Pub. L. No. 107-296, 116 Stat. 2135, § 1101 ("There is in the Department of Justice the Executive Office for Immigration Review, which shall be subject to the direction and regulation of the Attorney General under section 103(g) of the Immigration and Nationality Act . . . ."). This brief statutory mention of that office, however, does nothing other than recognize the Attorney General's authority over an office previously created. Many commentators have called for Congress to give statutory standing to the Board. *See, e.g.*, Roberts, *supra* note 16, at 43-44 ("It is time to give the Board statutory standing. Its existence as a quasi-judicial tribunal within the Department of Justice should be recognized by Congress . . . .").

27 Board of Immigration Appeals; Immigration Review Function; Editorial Amendments, 48 Fed. Reg. 8038, 8039 (Feb. 25, 1983).

28 Executive Office for Immigration Review; Board of Immigration Appeals; Expansion of the Board, 59 Fed. Reg. 47,231 (Sept. 15, 1994) (expanding BIA to nine permanent members); Executive Office for Immigration Review; Board of Immigration Appeals; Expansion of the Board, 60 Fed. Reg. 29,469 (June 5, 1995) (authorizing 12 permanent members); Executive Office for Immigration Review; Board of Immigration Appeals; Board Members, 61 Fed Reg. 59,305 (Nov. 22, 1996) (15 members); Executive Office for Immigration Review; Board of Immigration Appeals; 18 Board Members, 63 Fed. Reg. 51,518 (Sept. 28, 1998) (18 members); Executive Office for Immigration Review; Board of Immigration Appeals; 21 Board Members, 65 Fed. Reg. 20,068 (Apr. 14, 2000) (21 Board Members); Executive Office for Immigration Review; Board of Immigration Appeals; 23 Board Members, 66 Fed. Reg. 47,379 (Sept. 12, 2001) (23 Board Members).

29 Board of Immigration Appeals: Composition of Board and Temporary Board Members, 73 Fed. Reg. at 33,875 (providing for a Board composed of 15 Board Members, as well as allowing for the designation of temporary Board Members from EOIR attorneys who have at least ten years of experience in immigration law). *See* Fact Sheet, Executive Office for Immigration Review, U.S. Dept. of Justice, EOIR's Improvement Measures—Update 4 (June 5, 2009), *available at* http://www.usdoj.gov/eoir/press/09/EOIRs22ImprovementsProgress060509FINAL.pdf. As of August 2009, there was one vacancy. Fact Sheet, Executive Office for Immigration Review, U.S. Dept. of Justice, Board of Immigration Appeals (August 2009), *available at* http://www.usdoj.gov/eoir/fs/biabios.htm (providing biographical information for 14 Board Members).

30 The Director of EOIR may designate immigration judges, retired Board Members, retired immigration judges, and Administrative Law Judges employed within, or retired from, EOIR to act as Temporary Board Members. In addition, with the approval of the Deputy Attorney General, EOIR attorneys with at least ten years of immigration experience may be designated Temporary Board Members. 8 C.F.R. § 1003.1(a)(4).

31 *See* Board of Immigration Appeals: Composition of Board and Temporary Board Members, 71 Fed. Reg. 70,855 (Dec. 7, 2006).

single member or panel review; another hears all motions and jurisdictional questions; and two others conduct three-member panel review.[32]

B. Standards Governing Adjudication by the Board of Immigration Appeals

Historically a five-member Board reviewed all cases en banc. Facing an increasing case volume, three-member panels were instituted for the majority of decision making in 1988, although many cases continued to be heard en banc.[33] An increasing number of appeals, combined with changes in immigration law, however, increased the caseload of the Board even further and created a backlog of cases.[34] Therefore, the Department of Justice implemented the 1999 and 2002 Streamlining Reforms designed to reduce this backlog, which by the end of fiscal year 2001 totaled over 57,000 cases.[35]

1. The 1999 Streamlining Reforms

In 1999, the Department of Justice, under Attorney General Janet Reno, implemented several changes to the regulations governing the Board.[36] These changes were designed to enable the Board to process appeals more speedily and to "concentrat[e] its resources primarily on cases where there is a reasonable possibility that the result below was incorrect, or where a new or significant issue is being presented."[37]

The 1999 Streamlining Reforms enabled the Chairman of the BIA to designate certain categories of cases as appropriate for single member affirmance without opinion ("AWO"). Under this process, a single BIA member could affirm certain decisions of immigration judges without opinion if the member determined: (1) "that the result reached in the decision under review was correct"; (2) "that any errors in the decision under review were harmless or nonmaterial"; and (3) "that the issue on appeal was squarely controlled by existing BIA or federal court precedent and did not involve the application of precedent to a novel fact situation" or "the factual and legal questions raised on appeal are so insubstantial that three-member review is not warranted."[38] If these criteria were met, then the Board could issue a one-line order stating that "[t]he Board affirms, without opinion, the result of the decision below" without any "further explanation or reasoning."[39] This determination became the final agency decision.[40] Although the regulations dictated that such an opinion was an affirmance of the *result* reached by the immigration judge, the regulations specifically state that such an affirmance does not "imply approval of all of the reasoning of that decision," but merely indicates that the Board found that any errors in the immigration judge's decision were either "harmless or nonmaterial."[41] Following the 1999 Streamlining Reforms, the BIA Chairman specified that AWOs were not authorized for cases involving asylum, withholding, or Convention Against Torture claims, or for cases involving claims for suspension of deportation or

32 *See* Maria Baldini-Potermin, *Practice Before the Board of Immigration Appeals: Recent Roundtable and Additional Practice Tips*, 86 INTERPRETER RELEASES 2011 (2009). The screening panel consists of 51 staff attorneys and 12 paralegals who screen incoming cases; BIA members then decide those cases that remain with the screening panel. *Id.* at 2010. The merits panels, who conduct three-member panel review, are supported by 70 staff attorneys and 6 attorney managers. *Id.* at 2012.

33 *See* Executive Office for Immigration Review, Board of Immigration Appeals; Designation of Judges, 53 Fed. Reg. 15,659, 15,659-60 (May 3, 1988).

34 *See* DORSEY & WHITNEY, LLC, STUDY CONDUCTED FOR THE ABA COMM'N ON IMMIGRATION POLICY, PRACTICE AND PRO BONO RE: BOARD OF IMMIGRATION APPEALS: PROCEDURAL REFORMS TO IMPROVE CASE MANAGEMENT 17 (2003) (attributing the backload to: (1) the increased caseload at the BIA; (2) frequent, significant changes in immigration law; and (3) the number of members and other staffing issues at the BIA).

35 Board of Immigration Appeals: Procedural Reforms to Improve Case Management; Final Rule, 67 Fed. Reg. 54,878, 54,878 (Aug. 26, 2002).

36 Board of Immigration Appeals: Streamlining, 64 Fed. Reg. 56,135 (Oct. 18, 1999).

37 *Id.* at 56,136.

38 *Id.* at 56,141.

39 *Id.*

40 *Id.*

41 *Id.*

cancellation of removal, except in limited cases where certain statutory bars precluded relief.[42]

The 1999 Reforms also provided single members with the authority to dismiss appeals in certain categories of cases — cases in which the BIA lacks jurisdiction; untimely appeals; cases in which the noncitizen has filed an appeal from an immigration judge's entry of an order in absentia in removal proceedings; appeals failing to meet essential regulatory or statutory requirements; appeals from orders granting the requested relief; and appeals filed with the Board in which the Notice of Appeal fails to specify any grounds for appeal.[43]

Decisions that were not appropriate for an AWO or dismissal by a single member continued to be assigned to three-member panels for review.[44] As remains true today, panels can affirm, modify, or remand the immigration judge's decision, and provide any explanation deemed appropriate in doing so.[45]

An independent study completed by Andersen LLP in 2001 stated that the 1999 Streamlining Reforms were an "unqualified success" and were both viable and sustainable, in part, because under those procedures the BIA was completing more cases than filed and thus was no longer adding to a backlog.[46] According to that study, 26% of all cases were completed by a single board member, contributing to a 53% increase in the overall number of BIA cases completed in the period from September 2000 through August 2001.[47] In addition to increasing productivity, the study also found that the 1999 Streamlining Reforms had not adversely affected the quality of decisions.[48]

2. The 2002 Streamlining Reforms

In 2002, the Department of Justice, under Attorney General John Ashcroft, issued revised streamlining regulations (known as the "2002 Streamlining Reforms") to further reduce the backlog.[49] Rather than committing more resources to the Board, these reforms were instead designed to fundamentally amend the Board's existing adjudicatory process.[50] Indeed, as part of these reforms, the size of the Board was reduced from 23 to 11 members, which led to the removal of five existing Board Members.[51]

The 2002 Streamlining Reforms greatly expanded the categories of cases suitable for single-member review. Under these regulations, still in effect today, *all* cases are initially assigned to a single Board Member. The Board Member can then refer a case for decision by a three-member panel only if he or she determines that the case presents the need to: (1) settle inconsistencies among the rulings of different immigration judges; (2) establish a precedent construing the meaning of laws, regulations, or procedures; (3) review a decision that is not in conformity with the law or with applicable precedents;

---

42 The categories designated as appropriate for AWO included, *inter alia*, appeals from an immigration judge's order finding the respondent deportable or inadmissible where the underlying facts are not in dispute and there is no substantial question that the respondent is deportable or inadmissible; appeals in which statute or Board precedent are settled that the offense renders an alien inadmissible or deportable; appeals involving claims for asylum barred by a conviction for an aggravated felony; certain statutorily and time-barred appeals involving claims for withholding of removal; and appeals in which the alien claims citizenship or lawful permanent resident status and there is no evidence to support that claim. *See* Memorandum from Paul W. Schmidt, Chairman of the BIA, to all BIA Members 3 (Aug. 28, 2000); Memorandum of Paul W. Schmidt, Chairman of the BIA, to all BIA Members (Nov. 1, 2000).

43 Board of Immigration Appeals: Streamlining, 64 Fed. Reg. at 56,141; *see also* Memorandum from Paul W. Schmidt, Chairman of the BIA, to all BIA Members (Aug. 28, 2000).

44 Board of Immigration Appeals: Streamlining, 64 Fed. Reg. at 56,141.

45 Board of Immigration Appeals: Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents, 73 Fed. Reg. 34,654, 34,655 (June 18, 2008).

46 Andersen LLP, Board of Immigration Appeals (BIA) Streamlining Pilot Project Assessment Report 13 (2001) ("[T]he overwhelming weight of both the 'objective' and 'subjective' evidence gathered during the conduct of this study indicates that the Streamlining Pilot Project has been an unqualified success . . . .").

47 *Id.* at 5, 11, 13.

48 *Id.* at 11, 13.

49 Board of Immigration Appeals: Procedural Reforms to Improve Case Management; Final Rule, 67 Fed. Reg. 54,878, 54,878 (Aug. 26, 2002).

50 *See id.* at 54,879 ("It is now apparent that this substantial enlargement — more than quadrupling the size of the Board in less than seven years — has not succeeded in addressing the problem of effective and efficient administrative adjudication, and the Department declines to continue committing more resources to support the existing process. Rather, the Department believes that amendment of the adjudicatory process is a more effective approach . . . .").

51 *See id.* at 54,893 (stating that the Board would be reduced to 11 members).

(4) resolve a case or controversy of major national import; (5) review a clearly erroneous factual determination by an immigration judge; or (6) reverse a decision of an immigration judge or the Service if such a reversal is not plainly consistent with and required by intervening Board or judicial precedent, by an intervening Act of Congress, or by an intervening final regulation.[52]

The 2002 Streamlining Reforms also expanded the category of cases for which AWOs are appropriate. Under these regulations, the Board Member to whom a case is assigned *must* issue an AWO if the Board Member determines: (1) the result reached in the decision under review was correct; (2) any errors in the decision under review were harmless or nonmaterial; and (3) the issues on appeal are squarely controlled by existing Board or federal court precedent and do not involve the application of precedent to a novel factual situation, or the factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion.[53] In March 2002, prior to the finalizing of these rules, then Acting Chairman Lori Scialabba authorized the use of AWOs in cases involving claims for asylum and withholding of removal, claims brought under the Convention Against Torture, and cases involving claims for suspension of removal or cancellation of removal.[54] The authority to use AWOs was subsequently extended to *all* cases only two months later.[55]

Furthermore, the 2002 Streamlining Reforms also narrowed the Board's standard of review. The Board traditionally possessed the authority to review factual findings de novo, including the credibility determinations forming the factual basis for a decision under review.[56] In practice, the Board had traditionally given significant weight to immigration judge determinations regarding the credibility of witnesses at hearings and other findings based on observations of the witness if the bases for those findings were articulated in the immigration judge's opinion.[57] The 2002 Streamlining Reforms, however, went significantly further in restricting the Board's discretion, instituting a clearly erroneous standard of review for fact and credibility determinations.[58] De novo review was retained for questions of law or discretion and for factual determinations by DHS officers.[59]

The 2002 regulations also introduced strict time limits for the adjudication of cases. Once the record is complete and ready for adjudication, single Board Member decisions must generally be made within 90 days and panel decisions must be made within 180 days, though extensions are available in certain exigent circumstances.[60]

3. The 2006 Attorney General's Measures to Improve the Immigration Courts and the Board of Immigration Appeals

Following a review of EOIR, on August 9, 2006, then-Attorney General Alberto Gonzales directed EOIR to implement 22 specific measures claimed to enhance the performance of the immigration courts and the Board of Immigration Appeals.[61] At the Board level, the memorandum required the institution of performance evaluations, two-year trial periods after appointment, written immigration law exams for Board Members, improved training for Board Members and staff, mechanisms to detect poor conduct and quality in Board adjudication, a code of conduct for Board Members, a formal complaint procedure, updated sanctions power for the Board, procedures for referring cases of immigration fraud and abuse, and an expanded EOIR-sponsored pro bono program.[62]

---

52 8 C.F.R. § 1003.1(e)(6). Oral argument was also made unavailable in any case adjudicated by a single Board Member. *Id.* § 1003.1(e)(7).

53 *Id.* § 1003.1(e)(4)(i).

54 Memorandum from Lori Scialabba, Acting Chairman, BIA, to Board Members, Use of Summary Affirmance Orders in Asylum and Cancellation Cases (Mar. 15, 2002), *available at* http://www.usdoj.gov/eoir/vll/genifo/sl031502.pdf.

55 Memorandum from Lori Scialabba, Acting Chairman, BIA, to Board Members, Expanded Use of Summary Affirmance for Immigration Judge and Immigration and Naturalization Service Decisions (May 3, 2002), *available at* http://www.usdoj.gov/eoir/vll/genifo/st050302.pdf.

56 *See, e.g.*, *In re* Burbano, 20 I. & N. Dec. 872, 873-74 (BIA 1994).

57 *See id.* at 874.

58 8 C.F.R. § 1003.1(d)(3)(i).

59 *Id.* § 1003.1(d)(3)(i).

60 *Id.* § 1003.1(e)(8).

61 *See* Memorandum from the Attorney General, Measures to Improve the Immigration Courts and the Board of Immigration Appeals (Aug. 9, 2006), *available at* http://www.usdoj.gov/ag/readingroom/ag-080906.pdf.

62 *See id.* at 1-7.

Budget increases were proposed to provide for more staff attorneys and Board Members.[63] The measures also proposed changes to the 2002 Streamlining Reforms to encourage the use of one-member written opinions and three-member panels,[64] and to encourage the publication of precedent.[65]

To date, these reforms only have been partially implemented. For example, on June 16, 2008, EOIR published a final rule adopting a 2006 interim rule that added four Board member positions.[66] EOIR implemented annual performance evaluations for Board Members on July 1, 2008 and began administering immigration law examinations to new Board Members in August 2008.[67] EOIR also implemented periodic training on legal and procedural issues for Board Members and monthly training for BIA staff attorneys, and has expanded the reference materials available to Board Members and their staff.[68] EOIR also has solicited comments on draft Codes of Conduct for immigration judges and Board Members but has never promulgated a code.[69]

4. The 2008 Proposed Streamlining Reforms

In a further effort to implement the 2006 EOIR reforms, in June 2008, the Department of Justice proposed further revisions to the streamlining regulations (the "2008 Proposed Streamlining Reforms").[70] That rule would alter existing regulations regarding the use of affirmances without opinions, expand the scope of panel review, and devolve the power to designate decisions as precedent to individual panels.

First, this proposed rule would encourage the use of single-member short written opinions instead of AWOs.[71] The 2002 Streamlining Reforms *require* that a Board Member issue an AWO when certain regulatory criteria are satisfied, but the proposed rule would give Board Members discretion to decide whether to issue an AWO or to instead issue a brief written opinion explaining the reasoning for the decision.[72] This regulatory change would formalize the current practice of the Board, which issued a steadily decreasing number of AWOs as compared to short opinions throughout Chairman Juan Osuna's term.[73]

In addition, the proposed rule would increase the use of three-member panels by allowing a Board Member, in the exercise of his or her discretion, to refer a case to a three-member panel "when the case presents a complex, novel, or unusual legal or factual issue."[74] This provision was designed to enhance the review of complex or problematic cases. The Justice Department, in promulgating the proposed rule, also claimed it was necessary to permit the Board to publish more precedent, given that only cases before three-

63 *See id.* at 6.

64 *See id.* at 4-5 ("The Director of EOIR will draft a proposed rule that will adjust streamlining practices to (i) encourage the increased use of one-member written opinions to address poor or intemperate immigration judge decisions that reach the correct result but would benefit from discussion or clarification, and (ii) allow the limited use of three-member written opinions — as opposed to one-member written opinions — to provide greater analysis in a small class of particularly complex cases.").

65 *See id.* at 5 ("The Director of EOIR will draft a proposed rule that will revise processes for publishing opinions of three-member panels as precedential to provide for publication if a majority of panel members or a majority of permanent Board Members votes to publish the opinion, or if the Attorney General directs publication.").

66 *See* Board of Immigration Appeals: Composition of Board and Temporary Board Members, 73 Fed. Reg. 33,875 (June 16, 2008). The rule also allowed senior EOIR attorneys with at least ten years of immigration law experience to serve as Temporary Board Members. *Id.*

67 *See* Fact Sheet, Executive Office for Immigration Review, *supra* note 29, at 1.

68 *Id.* at 2. In 2009, for example, all Board staff attorneys were required to attend at least five 90-minute training sessions over the course of the year. *See* Memorandum from Juan Osuna to Board Legal Staff, Training Sessions for 2009 (Feb. 18, 2009) (on file with the American Bar Association Commission on Immigration.) In January 2007, EOIR began distributing a monthly newsletter to all immigration judges, Board Members, and BIA attorneys. Board Members and BIA attorneys also participated in an annual week-long training with immigration judges in August 2009.

69 Codes of Conduct for the Immigration Judges and Board Members, 72 Fed. Reg. 35,510 (June 28, 2007).

70 Board of Immigration Appeals: Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents, 73 Fed. Reg. 34,654, 34,655 (June 18, 2008).

71 *Id.*

72 *Id.* at 34,656.

73 *See infra* fig.3-1 and accompanying text. Juan Osuna was Acting Chair of the Board from October 2006 to September 2008, was appointed Chair in September 2008, and resigned in May 2009 to become Deputy Assistant Attorney General for the Office of Immigration Litigation in the Civil Division of the Department of Justice.

74 Board of Immigration Appeals: Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents, 73 Fed. Reg. at 34,658.

member panels or the Board en banc may be considered for publication.[75]

Finally, the proposed rule would increase the issuance of precedent by allowing three-member panels, by majority vote of the permanent Board Members on the panel, to designate their decisions as precedent after providing notice to the remaining Board Members, thus allowing as few as two Board Members to decide that their opinion should be precedential.[76]

As noted earlier, the Board currently issues a limited number of AWOs[77] and is already effectively implementing the proposed rule that makes AWOs discretionary; the two other proposed reforms, however, have not been fully implemented administratively. At this time, the 2008 Proposed Streamlining Reforms have not been finalized, but neither have they been withdrawn by the current Administration.

III. Issues Relating to the Board of Immigration Appeals

Following the 1999 and 2002 Streamlining Reforms, debate continues as to whether the BIA is fulfilling its purpose. Some critics have characterized the BIA as performing merely a "rubber-stamp" of immigration judge decisions, having abdicated its responsibility to correct errors of the decision makers below and craft uniformity to immigration law.[78] A number of circuit court decisions also have complained about purportedly shoddy decision making by immigration judges — and to a lesser extent, by the BIA itself — and have accused the Board of abdicating its oversight role.[79]

Judges, scholars, and practitioners have criticized numerous aspects of the Board's current operation, including: (1) the continuing backlog of unresolved appeals at the Board; (2) the prevalence of single-member review; (3) the issuance of AWOs; (4) the publication of short, perfunctory decisions that fail to provide sufficient evidence that the Board considered certain arguments made by appellants; (5) restrictions on the Board's ability to review the factual findings and credibility determinations made by immigration judges de novo; and (6) an inadequate volume of precedent decisions.

Moreover, Attorney General Ashcroft's efforts earlier this decade to reduce the size of the Board from 23 to 11 members, the accompanying reassignment or resignation of five Board Members, and a 2008 report by the Department of Justice describing the standards applied in hiring immigration judges and Board Members renewed long simmering concern about whether the Board is sufficiently independent as part of the Department of Justice.[80] Finally, the number of appeals from the Board to the Federal Courts of Appeals skyrocketed after implementation of the 2002 reforms, and many suggested that a loss of faith in the Board's adjudicatory ability was to blame for this expansion.[81] Each of these criticisms is addressed below.

A. The BIA Delays Immigration Adjudication

Unresolved appeals at the Board increased during the 1990s, when record immigration[82] and changes to

75 *Id.* at 34,659.

76 Board of Immigration Appeals: Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents, 73 Fed. Reg. at 34,663. The 2008 reforms also proposed significant limitations on the ability of circuit courts to review BIA opinions. These proposals are discussed in more detail in Part 4, *infra*.

77 Only 4% of the BIA's current decisions are issued as AWOs. Baldini-Potermin, *supra* note 32, at 2010.

78 *See, e.g.*, Appleseed, Assembly Line Injustice: Blueprint to Reform America's Immigration Courts 32 (2009), *available at* http://www.appleseeds.net/Portals/0/Documents/Publications/Assembly%20Line%20Injustice.pdf ("The BIA is seen as a highly politicized body that 'rubber stamps' immigration judge decisions, thereby limiting its effectiveness as an unbiased appellate body").

79 *See, e.g.*, Pasha v. Gonzales, 433 F.3d 530, 531 (7th Cir. 2005) ("At the risk of sounding like a broken record, we reiterate our oft-expressed concern with the adjudication of asylum claims by the Immigration Court and the Board of Immigration Appeals and with the defense of the BIA's asylum decisions in this court by the Justice Department's Office of Immigration Litigation."); Benslimane v. Gonzales, 430 F.3d 828, 830 (7th Cir. 2005) ("[T]he adjudication of [immigration] cases at the administrative level has fallen below the minimum standards of legal justice."). Judge Posner, for instance, suggested that appellate courts (or at least the Seventh Circuit) were reversing a substantial number of Board affirmances. *See id.* at 829 ("In the year ending on the date of the argument, different panels of this court reversed the Board of Immigration Appeals in whole or part in a staggering 40 percent of the 136 petitions to review the Board that were resolved on the merits. The corresponding figure, for the 82 civil cases during this period in which the United States was the appellee, was 18 percent.").

80 *See* discussion *supra* Section II.A; *see also* Part 5, Section I.C.

81 *See* ABA, Ensuring Fairness and Due Process in Immigration Proceedings 8 (2008) [hereinafter Ensuring Fairness], *available at* http://www.abanet.org/poladv/transition/2008dec_immigration.pdf.

82 *See* U.S. Dept. of Justice, 2001 Statistical Yearbook of the Immigration and Naturalization Service tbl.1 (2001) (showing immigration statistics for 1990s); U.S. Dept. of Justice, 2002 Statistical Yearbook of the Immigration and Naturalization Service tbl.62 (2002) (number of aliens removed jumped from 30,039 in 1990 to 185,731 in 2000).

immigration law[83] combined to generate an increased number of removal proceedings and appeals from those proceedings that overwhelmed the Board's ability to decide those appeals in a timely fashion.[84] By 2000, for example, it took an average of 1,100 days — approximately three years — from the time an asylum appeal was filed until the BIA's decision issued.[85] These lengthy delays in resolving appeals, while prolonging the time that those with weak claims may remain in the United States, also harm noncitizens (many of whom may be detained) who have a strong basis for appeal.

The most controversial aspects of the Board's current procedures — single-member review, AWOs, and a limited standard of review — derive from the 1999 and 2002 Streamlining Reforms. BIA completion data suggest that these measures succeeded in that very specific aim, as the number of pending cases has been greatly reduced from its highest level at the turn of the century:

Table 3-1[86] BIA Pending Case Appeals: 1998-2008

FISCAL YEAR	BIA RECEIPTS	BIA COMPLETIONS	PENDING CASES
1998	28,475	28,763	44,504
1999	31,087	23,011	52,580
2000	30,049	21,380	61,249
2001	28,148	31,800	57,597
2002	34,834	47,326	46,350
2003	42,038	48,042	40,662
2004	43,407	48,698	35,264
2005	43,924	46,338	33,063
2006	38,284	41,475	29,870
2007	35,295	35,394	35,139
2008	32,432	38,369	28,874

83 *See, e.g.*, Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359; Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978; Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009- 546; Nicaraguan Adjustment and Central American Relief Act of 1997, Pub. L. No. 105-100, § 201, 111 Stat. 2160-2193; Haitian Refugee Immigration Fairness Act of 1998, Pub. L. No. 105-277, div. A, § 101(h), tit. IX, 112 Stat. 2681-480, 2681-538; Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464; Legal Immigration Family Equity Act of 2000, Pub. L. No. 106-553, § 1(a)(2), tit. XI, 114 Stat. 2762, 2672A-142; Patriot Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

84 *See* U.S. Gov't Accountability Office, U.S. Asylum System: Significant Variation Existed in Asylum Outcomes Across Immigration Courts and Judges 49 & fig. 6 (2008) [hereinafter 2008 GAO Report], *available at* http://www.gao.gov/new.items/d08940.pdf ("for BIA appeals in cases involving asylum applications, the backlog of cases grew from fiscal year 1995 until fiscal year 2001"); Dorsey & Whitney, *supra* note 34, at 18 (the rate at which immigration judge decisions were being appealed to the BIA increased from 10.9% in 1996 to 15.7% in 2001).

85 *See* 2008 GAO Report, *supra* note 84, at 50.

86 The number of BIA receipts includes appeals from immigration judge decisions and appeals from DHS decisions (though the majority of cases reviewed by the BIA involve decisions made by immigration judges). All data regarding the BIA receipts and completions for each year were obtained from the most recent EOIR Statistical Year Book in which such data were available. *See* http://www.usdoj.gov/eoir/statspub/syb2000main.htm (last visited Aug. 27, 2009). More specifically, the numbers of pending cases for 2002-2008 were obtained from the most recent EOIR Statistical Year Book in which such data were available. *See id.* The numbers of pending cases for 1999-2001 were not available in any EOIR Year Book, so the number of pending cases for 2001 was obtained from the 2002 Streamlining Rule. *See* Board of Immigration Appeals: Procedural Reforms to Improve Case Management; Final Rule, 67 Fed. Reg. 54,878 (Aug. 26, 2002). The number of pending cases for 2000 was estimated according to the following formula: $\text{Pending Cases}_{2000} = \text{Pending Cases}_{2001} + (\text{Completions}_{2001} - \text{Receipts}_{2001})$. The resulting value was then used to calculate the pending cases for 1999 according to the same formula.

As Table 3-1 shows, the effect of both the 1999 and 2002 Streamlining Reforms was to increase the number of cases decided by the Board each year while also decreasing the number of appeals pending at the Board.[87] The Reforms also reduced the average time taken for each appeal — although it took on average 1,100 days for the Board to decide an appeal in 2000, by 2006 the average duration had dropped to 400 days.[88] Some have therefore concluded that the decision backlog has entirely disappeared, although we would note that the published data is not so conclusive.[89] Thus, measured simply from the perspective of docket control — as opposed to decision quality or fairness — the 1999 and 2002 Streamlining Reforms improved the Board's productivity with respect to the number of cases decided.

B. Too Many Appeals Are Decided by Single Board Members

Since March 2002, *all* appeals to the Board have been eligible for single-member review.[90] Today, a screening panel of staff attorneys reviews all cases and sends each appeal to a single Board Member for review unless the reviewing staff attorney believes it may meet one of the six regulatory exceptions.[91] The single Board Member then determines the appeal on the merits, unless he or she determines, based on the six regulatory criteria, that the case is appropriate for three-member panel review.[92] As a result of these reforms, single-member review has become the dominant form of BIA decision making.[93]

Numerous arguments have been put forward for why review by only one Board Member is inadequate for assuring careful consideration of removal decisions. First, review by only one Board Member may be less likely to catch errors made by immigration judges, as single-member decisions, including the decision to affirm without an opinion or summarily dismiss, are made without the benefit of the interplay of diverse legal minds.[94] Second, single-member review precludes dissent and denies the immigration adjudication system the benefit of the critical

87 It is difficult to isolate the effect of the 1999 Streamlining Reforms or the 2002 Streamlining Reforms on the increase in BIA completions. The 1999 Reforms were implemented in four phases and were not fully implemented until late 2000, which may explain why the backlog did not begin to decrease until FY 2001. *See* ANDERSEN LLP, *supra* note 46, at 3 (describing the four-phase implementation of the 1999 streamlining reforms). The 2002 Streamlining Reforms were promulgated in February 2002, and the final rule was published in August 2002. Based on this timing, at least one study has reasoned that a majority of the decrease in the backlog in FY 2002 is attributable solely to the 1999 Streamlining Reforms. *See* DORSEY & WHITNEY, LLP, *supra* note 34, at app.12 n.3.

88 *See* 2008 GAO REPORT, *supra* note 84. Note that, despite these improvements, the number remains considerably higher than the 90 or 180 days that the current regulations allot to the Board for decisions on appeals.

89 Published statistics do not make clear what percentage of the "pending" cases are part of any backlog as compared to the Board's active docket. If one considers that there were about 60,000 pending cases in 2000 (all of which was characterized by EOIR and others as a backlog of undecided appeals), and the Board has completed over 30,000 more cases than it has received since then, half of that backlog remains. Those who argue that the backlog has disappeared focus on the tremendous efforts the Board made in 2002 and 2003 to clear cases that had been pending at the Board for a long time. For example, at the beginning of 2003, 29 percent of the cases were more than two years old (*i.e.*, had been filed before 2001), but by the end of the year, the percentage of cases more than two years old (filed before 2002) had declined to less than three percent. *See* EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEPT. OF JUSTICE, FY 2003 STATISTICAL YEAR BOOK, at U2 (2004), *available at* http://www.usdoj.gov/eoir/statspub/fy03syb.pdf.

90 *See* Memorandum from Lori Scialabba, Acting Chairman, BIA, to Board Members, Expanded Use of Summary Affirmance for Immigration Judge and Immigration and Naturalization Service Decisions (May 3, 2002), *available at* http://www.usdoj.gov/eoir/vll/genifo/st050302.pdf. This decision was later codified as part of the 2002 Streamlining Reforms.

91 For a general description of this process, *see* Baldini-Potermin, *supra* note 32, at 2010-11.

92 8 C.F.R. § 1003.1(e)(3).

93 *See, e.g.*, Ramji-Nogales et al., *supra* note 11, at 334, 357 fig.40 (noting that in 1998, the Board issued 9,000 panel decisions in asylum cases and by 2005, it issued only 1,100 panel decisions, while issuing 16,000 decisions by single-members).

94 *See* Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 STAN. L. REV. 413, 447 (2007) ("[E]nlarging the decisional unit diminishes the impact of the extremists by diffusing their subjective biases, permits deliberation, and encourages consensus through moderation."); Interview with Philip Schrag, Professor, Georgetown University Law Center ("Single member review at the BIA fails to encourage serious deliberation and at the very least deprives members of the benefits of collaborative discussion."); Letter from American Immigration Lawyers Association to Charles K. Adkins-Blanch, Gen. Counsel, EOIR 16-17 (Mar. 20, 2002) [hereinafter AILA Streamlining Comments] ("To allow one perspective to rule the outcome of a single case would . . . increase the likelihood of an aberrant decision."); Letter from Robert D. Evans, Am. Bar Assoc. to Charles K. Adkins-Blanch, Gen. Counsel, EOIR 2-3 (Mar. 18, 2002) [hereinafter ABA Streamlining Comments] ("A panel of three Board Members is far more likely to catch an error below than a single Board member.").

arguments that can arise in dissenting opinions.[95] Third, some evidence, discussed in more detail in Section IV below, suggests that single-member adjudication inherently favors the government at the expense of the noncitizen. Fourth, the bar to panel review may be set almost unreachably high — applicants, many of whom proceed pro se or may be represented by inexperienced or overwhelmed lawyers can have difficulty presenting a claim appropriately for panel consideration. In light of these difficulties, Courts of Appeals have sometimes criticized the decision not to refer a case to a panel.[96]

C. The BIA Issues Too Few Reasoned Opinions

The general absence of lengthy, well-reasoned opinions also has been widely criticized. Much of the criticism has focused on AWOs, which are required under the 2002 Streamlining Reforms if the Board Member determines that the appeal meets certain regulatory criteria.[97] Immediately following the implementation of the 2002 reforms, in 2003 AWOs constituted more than 40% of the Board's decisions in asylum cases.[98] Critics argued that AWOs deny both the noncitizen and the reviewing court a reasoned explanation for the Board's decision.[99] Although challenges to the use of AWOs by the BIA as violations of due process or of administrative law procedures have failed,[100] the courts of appeals have found their use to have been inappropriate in certain cases.[101]

In practice, AWOs have declined considerably in recent years. Since 2006, Board practice has given Board Members wider discretion to decide whether to issue an AWO or to issue a written opinion explaining the reasoning for the decision.[102] As shown in Figure

95 *See, e.g.*, AILA Streamlining Comments, *supra* note 94, at 17 ("Dissenting opinions are an important part of the appellate process and the evolutionary nature of our laws. These opinions help shape the legal arguments that are made in future cases, and enhance the critical thinking that enrich our judicial system."); Letter from Leonard Glickman, President and CEO, HIAS to Charles K. Adkins-Blanch, Gen. Counsel, EOIR 3 (Mar. 20, 2002) ("A dissenting opinion is an important part of a reasoned decision, and reflects the deliberative process. Reasoned decisions are the building blocks in a system built on precedent. These decisions, including dissents, form the basis for future decisions, and a solid, orderly body of law."). Others, however, argue that dissent was used as nothing more than an opportunity to make public intra-Board disputes and was therefore of limited value. *See, e.g.*, Letter from Michael M. Hethmon, FAIR Staff Counsel, to Charles Adkins-Blanch, Gen. Counsel, EOIR 5 (Mar. 20, 2002).

96 *See, e.g.*, Purveegiin v. Gonzales, 448 F.3d 684, 692-93 (3d Cir. 2006) (the single-member misapplied the regulation by not referring case to a three-member panel). It should be noted that there is a circuit split, discussed in note 101, *infra*, about whether the courts of appeals have the authority to review the decision to refer an appeal to a single member.

97 These regulatory criteria include: (1) the result reached in the decision under review was correct; (2) any errors in the decision under review were harmless or nonmaterial; and (3) the issues on appeal are squarely controlled by existing Board or federal court precedent and do not involve the application of precedent to a novel factual situation, or the factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion in the case. 8 C.F.R. § 1003.1(e)(4)(i).

98 Ramji-Nogales et al., *supra* note 11, at 357 fig.39 (asylum only).

99 *See, e.g.*, Petition for Writ of Certiorari at 22, Aleru v. Gonzales, 544 U.S. 919 (2005) (No. 04-670), 2004 WL 2652267, at *22 (Nov. 17, 2004) ("No court can decide a case with the finality demanded by Article III if the substance of that case is withheld from it."); Brief of the American Immigration Law Foundation as Amicus Curiae for the Petitioner at 27-28, Yuk v. Ashcroft, 2003 WL 23758167, at *27 (10th Cir. Jan 27, 2003) ("To ensure that a petitioner's due process rights are protected, this Court must be able to discern, from the Board's rationale of its decision, that the Board in fact provided a meaningful, individualized review of the case."); John R.B. Palmer, et al., *Why are so Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. L.J. 1, 29-31 (2005) (citing criticism by lawyers, scholars, members of Congress, immigration judges, and a former Board Member).

100 *See* Blanco de Belbruno v. Ashcroft, 362 F.3d 272 (4th Cir 2004); Zhang v. United States Department of Justice, 362 F.3d 155 (2d Cir 2004); Yuk v. Ashcroft, 355 F.3d 1222 (10th Cir 2004); Loulou v. Ashcroft, 354 F.3d 706 (8th Cir 2003); Dia v. Ashcroft, 353 F.3d 228 (3d Cir 2003) (en banc); Denko v. INS, 351 F.3d 717 (6th Cir 2003); Falcon Carriche v. Ashcroft, 350 F.3d 845 (9th Cir 2003); Georgis v. Ashcroft, 328 F.3d 962 (7th Cir 2003); Mendoza v. U.S. Att'y Gen., 327 F.3d 1283, 1288 (11th Cir 2003); Soadjede v. Ashcroft, 324 F.3d 830, 832-33 (5th Cir 2003); Albathani v. INS, 318 F.3d 365, 379 (1st Cir 2003). The U.S. District Court for the District of Columbia also rejected an Administrative Procedure Act suit arguing that the Department of Justice acted arbitrarily and capriciously in promulgating the 2002 streamlining reforms. *See* Capital Area Immigrants' Rights Coal. v. U.S. Dep't of Justice, 264 F. Supp. 2d 14, 39 (D.D.C. 2003).

101 Rodriguez-Echevarria v. Mukasey, 534 F.3d 1047, 1052 (9th Cir. 2008) (suggesting AWO inappropriate because precedent needed and issues substantial); Chen v. Ashcroft, 378 F.3d 1081, 1088 (9th Cir. 2004) (finding use of AWO erroneous because case involved a novel legal issue). *In re* Smriko, 23 I. & N. Dec. 836 (BIA 2005) (BIA decision after the Third Circuit remanded case because it had been erroneously subject to an AWO decision). Two courts of appeals have held that there is no jurisdiction over the use of the AWO procedure. *See* Ngure v. Ashcroft, 367 F.3d 975, 981-88 (8th Cir. 2004); Tsegay v. Ashcroft, 386 F.3d 1347, 1355-58 (10th Cir. 2004).

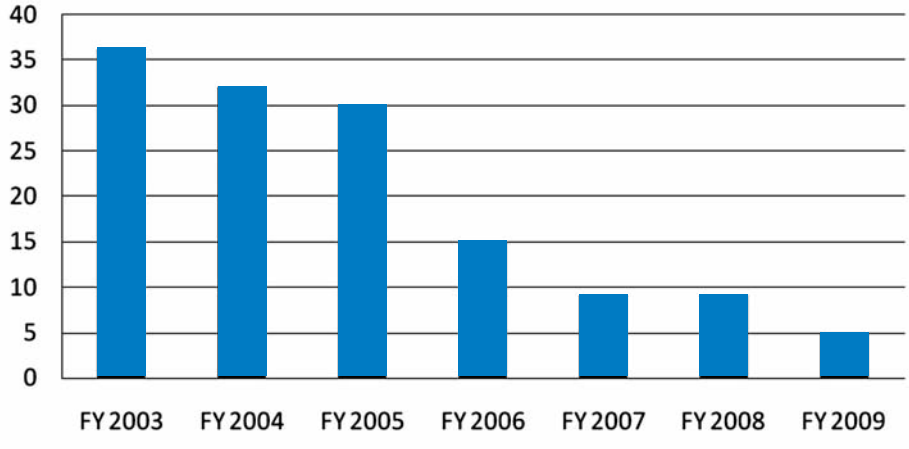
102 The 2008 proposed streamlining reforms would amend the Board's regulations to formally authorize this practice. *See* Board of Immigration Appeals: Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents, 73 Fed. Reg. 34,654, 34,656 (June 18, 2008).

3-1, AWOs constituted only about five percent of Board decisions in the first six months of FY 2009.[103]

The decline in AWOs suggests that the Board has tacitly acknowledged criticism that AWOs should not be used in circumstances where a short opinion might better clarify the Board's analysis. Since affirmances without opinions have become disfavored and their use has declined, short opinions varying in length from several paragraphs to several pages issued by single members are now the dominant form of decision making.[104]

Although this change has improved the quality of adjudication to some extent, more improvement is both possible and necessary. The Board is not currently required to issue decisions responding to all arguments made by appealing parties; consequently, some Board decisions can be as short as two or three sentences, even when issues would appear to merit a longer discussion.[105] If such brief opinions fail to address the parties' contentions or fail to provide a reviewing court a clear basis for the BIA's decision, then they are little better than AWOs in terms of providing evidence that the BIA has performed its role in thoroughly reviewing the immigration judge's decision and carefully considering the arguments for relief. Many argue that appeals of a Board decision are more likely when an appellant's specific arguments are not addressed in writing.[106] Further, as Professor Legomsky has noted,

Figure 3-1
Percentage of AWOs: 2003-2009



103 According to former BIA Chairman Juan Osuna, the AWO rate was 36% in FY 2003, 32% in FY2004, 30% in FY2005, 15% in FY2006, and 9% in both FY2007 and FY2008. For the first six months of FY 2009, the rate was 5%. *See* July 28, 2009 email from Deputy Assistant Attorney General Juan Osuna (on file with the American Bar Association Commission on Immigration). The current rate, as reported by former Chairman Osuna in August 2009, is 4%. Baldini-Potermin, *supra* note 32, at 2010; *see also* Interview with Phillip Schrag, Professor, Georgetown University Law Center (AWOs represent just 5% of the BIA's decisions in 2008); Executive Office for Immigration Review, U.S. Dept. of Justice, Fact Sheet: EOIR's Improvement Measures—Update 3 (June 5, 2009) ("EOIR decreased the issuance of AWOs to approximately 4 percent by the beginning of calendar year 2009"), *available at* http://www.usdoj.gov/eoir/press/09/EOIRs22ImprovementsProgress060509FINAL.pdf.

104 Ramji-Nogales et al., *supra* note 11, at 357 fig.39. If a Board Member assigned to review an appeal decides that the appeal does not meet the criteria for an affirmance without opinion, the member is instructed by the regulations to issue a brief order affirming, reversing, modifying, or remanding the decision under review. 8 C.F.R. § 1003.1(e)(5).

105 Ramji-Nogales et al., *supra* note 11, at 384; Interview with Philip Schrag, Professor, Georgetown University Law Center ("The BIA is not required to issue decisions that respond to all substantial arguments made by losing parties. Accordingly, even though the Board is moving away from any affirmances without opinion at all, BIA affirmances often consist of a paragraph or two when the issues raised by the appellant merit a two or three page discussion.").

106 Ramji-Nogales et al., *supra* note 11, at 385 n.159 ("Social psychology studies have found that the perception that the decision maker has given 'due consideration' to the 'respondent's views and arguments' is crucial to individuals' acceptance of both the decision and the authority of the institution that imposes the decision.") (citing E. Allan Lind & Tom R. Tyler, The Social Psychology of Procedural Justice 80-81, 104-06 (1988)); Interview with Phillip Schrag, Professor, Georgetown University Law Center ("Lengthier opinions—even if they do little more than restate and respond to losing arguments—will have the effect of decreasing the volume of appeals going to the federal courts.").

the very practice of explaining a decision in a reasoned, written opinion has a positive impact on the Board's collective decision making abilities:

> [T]he discipline of providing a convincing reasoned explanation forces the adjudicator to assure that it is defensible. . . . If one possible outcome would potentially conflict with another decision, the adjudicator has to decide consciously whether the two outcomes would be reconcilable. Without a reasoned written opinion, there is more room for gut instinct and visceral reactions based on personal or political outlook. Since those outlooks, in turn, will vary from one adjudicator to another, reasoned written opinions should, all else equal, enhance consistency.[107]

Reasoned opinions also facilitate the Board's oversight role. Full opinions that address all of the issues in the case help better educate immigration judges about the errors in their opinions. As a result, not only may such opinions help decrease the error in Board decision making, but they also could help decrease error in immigration judge opinions.

D. Limits on the Board's Standard of Review Prevent it From Addressing Disparities Among Immigration Judges

The 2002 Streamlining Reforms narrowed the Board's standard of review, requiring Board Members to accept the factual findings of an immigration judge, including as to the credibility of applicant and witness testimony, unless those findings are "clearly erroneous."[108] Previously, the Board was granted the authority to review the factual findings of immigration judge decisions de novo, and could use this power to correct decisions without needing to remand the case back to the immigration court for further factual findings.[109] Accordingly, the more stringent standard of review inhibits the Board's ability to correct mistakes made by immigration judges, which arguably are more likely to arise in the context of immigration adjudication than other administrative fact finding given the crushing caseloads at the immigration courts and the complex facts inherent in removal adjudication.

Similarly, the removal of de novo review power also greatly restricts the Board's ability to reconcile disparities among immigration judge decisions in factually similar cases.[110] Furthermore, the more limited standard of review also may have increased the disparity in immigration law because it may have been a partial cause of the increased rate of appeals to the circuit courts, as it limited the scope of the Board's powers to explain its decisions, thus likely placing greater pressure on disappointed applicants to appeal further. Coupled with the AWO rules, a case in which the immigration judge made significant errors in decision making yet reached the result that an individual Board Member thought appropriate, could still be affirmed.[111] With 11 circuits reviewing the findings and conclusions of over 200 immigration judges, noncitizens and their attorneys are often confronted with conflicting decisions on what the law is.[112]

Moreover, although a deferential standard of review is traditionally employed by many administrative boards, some contend that the "clearly erroneous" standard of review ignores the important difference between formal court proceedings and immigration hearings. The former are often highly

---

107 Legomsky, *supra* note 94, at 437.

108 8 C.F.R. § 1003.1(d)(3)(i). Note that under 8 C.F.R. § 1003.1(d)(3), questions of law, of discretion, of judgment and "all other issues on appeal from decisions of immigration judges" remain subject to de novo review.

109 The only recourse for a party asserting that the BIA cannot properly resolve an appeal without further fact finding is a motion for remand to the immigration judge, or, where appropriate, to DHS for additional fact finding.

110 Legomsky, *supra* note 94, at 436-37 ("[W]hile BIA review of immigration judge decisions should generally enhance consistency . . . the degree of enhancement is constrained on fact questions by the narrow scope of review. . . . One way to promote consistency would be to restore de novo BIA review of immigration judges' findings of fact.").

111 As explained by Acting Chair David Neal, AWOs "do not mean that the immigration judge did everything right in deciding the case but rather that no matter how much time spent by the BIA on the case, the outcome won't change. . . ." Baldini-Potermin, *supra* note 32, at 2011.

112 *See* Letter from Timothy H. Edgar, Legislative Counsel, ACLU to Charles K. Adkins-Blanch, Gen. Counsel, EOIR 6 (Mar. 21, 2002) [hereinafter ACLU Streamlining Comments] ("This proposed section of the rule, instead of promoting consistency and uniformity, will create conflicting decisions from each circuit and district court in the country, resulting in more confusion as to how to best interpret the law."); AILA Streamlining Comments, *supra* note 94, at 13 ("The resulting cacophony of decisions will then be cited as precedents to those 220 IJs in new cases, with the result that *no one will know what the law is*." (emphasis in original)).

formalized and rule-bound, but immigration court hearings are more informal, often involving unrepresented parties.[113] Given the overwhelming caseload, immigration judge decisions very likely will continue to be dictated from the bench, increasing the possibility for error.[114] In addition, claims for relief from removal often turn on country conditions, which may change rapidly and unpredictably.[115]

The benefits that in-person credibility evaluations afford decision makers also may be less significant in immigration hearings than in other adjudications. Frequently immigration court testimony is given through a translator, inserting an artificial barrier between the testifier and the testimony, and potentially clouding evaluation. Further, immigration judges may evaluate the testimony through the lens of their own experience, and cultural differences can affect demeanor and behavioral cues in a way that makes the noncitizen seem untruthful.[116] Consequently, in some cases de novo review of a transcript may be a superior way to evaluate an applicant's credibility than in-person testimony. As then-Board Chair Paul W. Schmidt explained in his *In re A-S-* dissent,[117] although the Board "may lack the advantage of a face-to-face observation of the witness, [it has] the very substantial, and much underrated, advantage of being able to review a written transcript."[118] Moreover, "the absence of personal interaction with the parties and their counsel in the trial courtroom insulates [Board Members] from the almost inevitable, and often distracting, frustrations and extraneous factors that could accompany such personal interaction, particularly in a 'high-volume' trial system like the immigration court."[119] Based on these considerations, Judge Schmidt concluded, "it is not clear to me why our vantage point is necessarily less revealing than that of the immigration judge and why we want to give such great deference to the immigration judge, rather than relying on our own expertise and sound, independent judgment after review of the written record on appeal."[120]

E. Time Limits on Appellants and Board Members are Unduly Abbreviated

In an effort to clear the backlog of unresolved appeals, the 2002 Streamlining Reforms imposed tight deadlines on both appellants in litigating their cases and on Board Members in deciding the matters before them. The briefing calendar for appellants is now just 21 days.[121] Appeals involving detained noncitizens are briefed concurrently and reply briefs are permitted only by leave of the BIA.[122] The time period in these provisions has been viewed as unduly short compared to other appellate time periods.[123] In addition, the Board must generally dispose of all appeals assigned to

113 *See* ACLU Streamlining Comments, *supra* note 112, at 5; *see also* ABA Streamlining Comments, *supra* note 94, at 6 ("Because the Board has always reviewed the decisions of the immigration judges de novo, the federal courts have assumed that any errors committed by the immigration judge were corrected by such review and that the Board's decision is the last best decision of the AG . . . de novo consideration of evidence by the Board could also prevent unnecessary appeals to the federal courts where the judge below made fact finding errors.").

114 *See* AILA Streamlining Comments, *supra* note 94, at 13 ("[I]n the vast majority of cases IJs render oral decisions immediately upon the completion of testimony. They do not review the recorded testimony, but instead rely on their memory and any notes taken during the proceedings. As a result, IJs will occasionally misstate or omit important factual information in their decisions."); *see also Judicial and Administrative Review of Immigration Decisions: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Prof. David A. Martin) ("Occasional exercise of that factual review authority by the BIA can be quite useful, because immigration judges will continue to handle high caseloads and will continue ordinarily to dictate their decisions at the close of the hearings."), *available at* http://judiciary.senate.gov/hearings/testimony.cfm?id=1845&wit_id=673.

115 *See* AILA Streamlining Comments, *supra* note 94, at 15 ("[T]he BIA must have the flexibility to deal with changed country conditions and the development of new facts that can have a decisive effect on the outcome of a case.").

116 *See id.* at 14 (citing *Matter of B-*, 7 I. & N. Dec. 1 (BIA, Comm'r 1955; A.G. 1956)).

117 *In re* A-S-, 21 I. & N. Dec. 1106, 1113 (BIA 1998) (Schmidt, J., dissenting).

118 *Id.* at 1114.

119 *Id*.

120 *Id*.

121 8 C.F.R. § 1003.3(c). A single extension of 21 days may be available. BIA PRACTICE MANUAL, *supra* note 1: § 54.7(C).

122 The BIA may, upon written motion and for good cause, extend the period for filing a brief or reply brief for up to 90 days, and the BIA has the discretion to consider a brief that has been filed out of time. 8 C.F.R. § 1003.3(c).

123 In comparison, Federal Rules of Appellate Procedure Rule 31 allows an appellant 40 days to file its principal brief after the record is filed; and an appellee has 30 days to respond. FED. R. APP. P. 31.

a single Board Member within 90 days of completion of the record on appeal, or within 180 days after an appeal is assigned to a three-member panel.[124] To ensure these deadlines are followed, regulations require that the Chairman notify the Director of EOIR and the Attorney General if a Board Member consistently fails to meet these deadlines and prepare a report assessing the timeliness of the disposition of cases by each Board Member.[125] The threat of sanction that this provision provides has had the desired effect, and the vast majority of decisions are now made within the specified time periods.[126]

These time limits, however, and their effects on the Board's decision making, have been less criticized than other aspects of the 2002 streamlining. It seems hard to deny, however, that a 90-day deadline creates incentives for single Board Members to issue more perfunctory opinions than they might otherwise. Current Board procedures provide the opportunity for Board Members assigned single-member review to consult with staff attorneys and other Board Members in deciding their appeals.[127] By compressing the time available to issue each decision, these limits also compress the time available to consult and to analyze each case, effectively limiting Board Members from seeking additional viewpoints during their review. Consequently, relaxing these deadlines could significantly increase the likelihood of more fully reasoned decisions.

F. The BIA Does Not Generate Enough Precedent

Although one of the functions of the Board is to craft uniformity in immigration law, the Board issues few precedential decisions. Proponents of greater precedent argue that a more substantial volume of Board precedent could provide a solid, orderly body of law and facilitate efforts to minimize disparity among immigration judges and Asylum Officers.[128] Not all have agreed, however, that this small volume of precedent necessarily presents a problem, perhaps preferring that immigration law precedent remain primarily the province of the circuit courts.[129] Although the Board has made an effort to publish more precedent decisions, publishing more precedents in the past two years than the Board has since the late 1990s, the proportion of cases designated as precedential compared to those decided and potentially eligible for such designation, remains small.[130]

Although the Board has ruled that it must follow the precedent of the circuit in which individual cases arise and yield in the face of a conflict,[131] the precedent the Board does issue has a dramatic and far-reaching impact that affects hundreds of thousands of noncitizens each year because BIA precedent must be

---

124 There are exceptions: in exigent circumstances, the Chairman may grant an extension of up to 60 days. 8 C.F.R. § 1003.1(e)(8)(i), (ii). If a 60-day extension is granted and the panel is unable to issue a decision within the additional 60 days, the appeal shall either be assigned to the Chairman or the Vice-Chairman for a final decision within 14 days or shall be referred to the Attorney General for decision. *Id.* § 1003.1(e)(8)(ii). If a dissenting or concurring panel member fails to complete his or her opinion by the end of the 60-day extension period, the majority decision is rendered without that dissent or concurrence attached. *Id*.

125 *Id.* § 1003.1(e)(8)(v).

126 *See generally* Baldini-Potermin, *supra* note 32, at 2010 (noting that former "Chairman Osuna indicated that the streamlining regulations and the timeframes set out in them are taken very seriously" by the Board).

127 *See* Baldini-Potermin, *supra* note 32, at 2011-12.

128 *See* Legomsky, *supra* note 94, at 456 ("The Attorney General also has said that the BIA would increasingly use its power to designate selected decisions as precedents, which are binding on immigration judges and all DHS employees, including asylum officers. . . . That step too should promote consistency.").

129 *See* American Immigration Law Foundation, Comments on Board of Immigration Appeals: Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents; EOIR Docket No. 159 P, at 11 (stating that there is no support for the claim by EOIR in the 2008 proposed rulemaking that the BIA issues an "inadequate" volume of precedent, because it was then issuing as much precedent as it did in 1996.)

130 *See infra* Table 3-2 and discussion following.

131 *In re* Cazares-Alvarez, 21 I. & N. Dec. 188 (BIA 1969); *In re* Olivares-Martinez, 23 I. & N. Dec. 148 (BIA 2001); *see also* Jama v. Immigration & Customs Enforcement, 543 U.S. 335, 350 n.10 (2005) ("[T]he BIA follows the law of the circuit in which the individual case arises"); Singh v. Ilchert, 63 F.3d 1501, 1508 (9th Cir. 1995) (holding that the BIA "is obligated to follow circuit precedent in cases originating within that circuit."). This deference to conflicting circuit court precedents is currently partially self-imposed: the Supreme Court's decision in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005), provides an agency charged with implementing a particular body of law, the ability to offer national interpretations so long as the statute being interpreted is ambiguous.

followed by all immigration judges and DHS personnel.[132] For a decision to be selected as precedential, it must meet one or more of several criteria, including but not limited to: "the resolution of an issue of first impression; alteration, modification, or clarification of an existing rule of law; reaffirmation of an existing rule of law; resolution of a conflict of authority; and discussion of an issue of significant public interest."[133]

Both the complexity and volatility of immigration law have provided the Board with ample opportunity to select cases on this basis. Nevertheless, as shown in Table 3-2, the vast majority of the Board's decisions remain non-precedential:

Table 3-2[134] BIA and AG Precedential Decisions 1996-2008

FISCAL YEAR	BIA PRECEDENT	A.G. PRECEDENT	TOTAL PANEL DECISIONS	% OF PANEL DECISIONS	% OF TOTAL BIA COMPLETIONS
1996	40	0	18,304	0.24%	.24%
1997	32	0	24,566	0.14%	.14%
1998	41	0	28,763	0.14%	.14%
1999	50	0	23,011	0.22%	.22%
2000	18	0	Not Available	Not Available	.08%
2001	19	0	Not Available	Not Available	.06%
2002	23	2	Not Available	Not Available	.05%
2003	10	1	3,356	.32%	.02%
2004	6	3	3,383	0.27%	.02%
2005	14	4	Not Available	Not Available	.04%
2006	26	0	Not Available	Not Available	.06%
2007	45	1	Not Available	Not Available	.13%
2008	34	3	Not Available	Not Available	.10%

132 BIA PRACTICE MANUAL, *supra* note 1, § 1.4(d)(i) ("Published decisions are binding on the parties to the decision. Published decisions also constitute precedent that binds the Board, the Immigration Courts, and DHS."); *id.* § 4(d)(ii) ("Unpublished decisions are binding on the parties to the decision but are not considered precedent for unrelated cases.").

133 *Id.* § 1.4(d)(i)(A); *id.* § 1.4(d)(i) (citing 8 C.F.R. § 1003.1(g)). Additionally, the Attorney General also can issue precedent, in his or her capacity to overrule BIA decisions. 8 U.S.C. § 1103(g)(2) (Attorney General shall review administrative determinations in immigration proceedings as necessary for carrying out his duties).

134 Data regarding the number of BIA and AG precedential decisions were obtained from Volumes 19-24, I. & N. Dec., *available at* http://www.usdoj.gov/eoir/vll/intdec/lib_indecitnet.html (last visited Jan. 29, 2009). Data regarding the total number of BIA completions were obtained from the most recent EOIR statistical yearbook in which such information is available. *See* http://www.usdoj.gov/eoir/statspub/syb2000main.htm (last visited Aug. 27, 2009). The total number of panel and en banc decisions for 1996-1999 were estimated to be roughly equivalent to the number of BIA completions for those years, because all cases were decided by three-member panels or the Board en banc prior to the 1999 Streamlining Reforms. Data regarding the total number of panel decisions for 2003 and 2004 was obtained from Table U1 of EOIR Statistical Year Book for that year. *See id.* EOIR Statistical Year Books for other fiscal years do not contain such data. If EOIR possesses data on the number of panel and en banc decisions in these years, we encourage EOIR to make such data publicly available.

It is unclear why the volume of precedent is so low relative to both the number of panel and en banc decisions and the number of overall decisions. Potential factors accounting for this low volume include: (1) the procedural requirements for designating a decision as precedential which limit the potential range of cases that can be so designated; (2) a conservative view of either the suitability or utility of Board precedent by Board Members or Board management; and (3) a result of the Board's focus of its limited resources on case production over preparation of precedents, a time and resource-intensive process.

The low volume of precedent can be partially explained by the Board's procedures regarding how and when opinions can be designated as precedential. Only decisions issuing from panels of the Board or from the Board en banc can be considered for designation as precedential.[135] Thus, the 2002 Streamlining Reforms, which mandate single-member review for the vast majority of decisions, sharply limited the volume of cases that might become precedential. Furthermore, panel or en banc decisions can only become precedent if a majority of the permanent members of the Board authorizes the designation of a particular decision as such.[136] Current regulations do not specify whether all panel decisions must be voted on by the Board as potential precedent; rather, the precise procedure by which opinions are chosen for consideration as potential precedent appears to exist at the discretion of the Board's management. As recently explained by former Chairman Juan Osuna, decisions may be raised for consideration as precedent by the Board by request from a Court of Appeals, by letters from attorneys to the Board, and by internal Board processes in which an issue ripe for precedent is identified by a committee, or BIA staff attorneys.[137]

Nevertheless, these procedural hurdles themselves cannot be the sole reason for the small amount of Board precedent that has issued throughout the last ten years. The number of decisions emerging from panel review is still quite ample to serve as a source of potential precedent opinions: in 2004, for instance, there were roughly 3,383 panel decisions, yet the Board issued just 14 precedential decisions — meaning that only 0.27% of all panel decisions issued that year were subsequently designated as precedent.[138]

A more likely explanation would appear to be the customary culture and practice within the Board itself. As Table 3-2 above makes clear, though the volume of precedent has stayed relatively constant as a percentage of total panel and en banc decisions, it has remained at less than 1% of such decisions in the years for which data are available. Therefore, it seems clear that the production of a substantial volume of precedent generally has not been a priority for Board management, even before the implementation of the 1999 and 2002 Streamlining Reforms. Admittedly, the number of precedential decisions has increased in recent years — but it still falls far short of the percentage of precedential opinions (over 15%) typically issued by federal appellate courts.[139] Assuming that the number of panel decisions has remained relatively static at around 3,000 decisions per year, an equivalent volume of precedent to that issued by the federal appellate courts would be on the order of 400 to 500 decisions per year. Even taking account of the different nature of the cases reviewed by the appellate courts and those reviewed by the BIA, one would expect more precedential decisions from the BIA.

The 2008 Proposed Streamlining Reforms would alter the current process for issuing precedent by providing that three-member panels would have the authority to authorize the publication of decisions as precedent, without needing the vote of a majority of the Board as a whole.[140] This proposed procedural change, however, would appear to be an unsatisfactory solution to the small volume of issued precedent; careful consideration by the Board as a whole as to whether a particular opinion offers needed clarification in the law is a necessary step to crafting greater uniformity in immigration adjudication.

---

135 8 C.F.R. § 1003.1(g).

136 *Id*.

137 *See* Baldini-Potermin, *supra* note 32, at 2012.

138 *See supra* Table 3-2.

139 In 2007, for example, only 83.5% of federal circuit court opinions were unpublished. *See* U.S. Courts, 2007 Judicial Facts and Figures tbl. 2.5, http://www.uscourts.gov/judicialfactsfigures/2007.html (last visited Dec. 23, 2009).

140 *See* Board of Immigration Appeals: Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents, 73 Fed. Reg. 34,654, 34,661-62 (June 18, 2008).

G. The BIA Is Insufficiently Independent

The Board exists by virtue of the Attorney General's regulations. The Attorney General defines and modifies the Board's powers[141] and can overrule its decisions, although this authority is used rarely.[142] The most frequently articulated criticism of the Attorney General's authority over the Board is that Board adjudication can be politicized — either directly through the firing of members whose decisions the Attorney General disagrees with, or indirectly via the threat that certain opinions may be reversed if they do not comport with the implied political or policy direction of the Attorney General.

Criticism of the BIA's placement within the Justice Department is not new. For example, in 1997 the United States Commission on Immigration Reform, in recommending the creation of a new independent agency within the Executive Branch to review immigration related decisions, wrote that EOIR's location within the Department of Justice "injects into a quasi-judicial appellate process the possibility of intervention by the highest ranking law enforcement official in the land, and, generally, can undermine the BIA's autonomy and stature."[143]

In 2002, according to some, the "possibility of intervention" became actual intervention. As explained in an article by Jaya Ramji-Nogales, Andrew Schoenholtz, and Philip Schrag, the members removed in the downsizing of the Board from 23 authorized positions to 11 members were those with the highest rate of voting in favor of noncitizens.[144] Commentators have noted that "in the months between Ashcroft's announcement that he would reduce the size of the Board and his actual removal of five members, the Board's rate of voting in favor of immigrants declined."[145] As they explain it, the use of "political standards to hire and fire immigration judges and Board of Immigration Appeals members may have been a conscious effort to pack the court with judges who would always give the government's deportation arguments every benefit of the doubt."[146] Similarly, Professor Peter Levinson's study of Board Member voting patterns in 11 closely divided en banc cases also lends support to the hypothesis that particular adjudicators were likely removed because of their perceived liberal views.[147]

The Attorney General's ability to remove Board Members also has been criticized on the ground that the mere threat of termination has the potential to skew the decision making of remaining Board Members to win favor with political leadership. However, Professor Levinson's survey of voting patterns found that even after the announcement of Board downsizing in 2002, those Board Members he identified as more likely to favor noncitizens continued to support such outcomes in closely divided cases. According to Levinson, this finding suggests that "the emphasis in our legal culture on deciding cases without reference to the adjudicator's own self-interest may be a strong enough influence on some administrative judges to enable them to reach independent judgments even when confronting a most direct threat to judicial independence — the loss of one's job."[148]

Even if the threat of termination does not directly affect Board decision making, however, the perception that adjudicators are easily removed damages the reputation and legitimacy of the Board. As noted by Dana Leigh Marks, President of the National Association of Immigration Judges, the downsizing of the Board in connection with the 2002 Streamlining Reforms and the pro-enforcement appearance of that action, damaged the reputation of the immigration

141 *See* 8 C.F.R. § 1003.1(h).

142 *See* 8 U.S.C. § 1103(g)(2) ("The Attorney General shall . . . review such administrative determinations in immigration proceedings . . . as the Attorney General determines to be necessary for carrying out this section").

143 *See* JAYA RAMJI-NOGALES, ANDREW I. SCHOENHOLTZ & PHILIP G. SCHRAG, REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM 104 n.52 (NYU Press 2009); *see also* Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish an Article I Immigration Court*, 13 BENDERS IMMIGR. BULLETIN 3 (2008) (discussing the lack of independence of EOIR); Part 6, *infra,* discusses in further detail the rationale behind an Article I court.

144 RAMJI-NOGALES ET AL., *supra* note 143, at 100 (citing Legomsky, *supra*, note 94).

145 *Id.* at 100.

146 *Id*. at 19-20 (citing Legomsky, *supra* note 94); *see also* NAT'L ASS'N OF IMMIGRATION JUDGES, AN INDEPENDENT IMMIGRATION COURT: AN IDEA WHOSE TIME HAS COME 11 (2002) ("The taint of the inherent conflict of interest caused by housing [EOIR] within DOJ is insidious and pervasive" and has not been resolved by the creation of the DHS and placement of all former INS functions there.).

147 *See* Peter J. Levinson, *The Façade of Quasi-Judicial Independence in Immigration Appellate Adjudications*, 9 BENDER'S IMMIGR. BULLETIN 1154 (2004).

148 *Id.*

courts and the Board as being neutral, independent decision makers.[149]

H. The BIA Lacks Sufficient Resources to Deal with Its Caseload

EOIR's 2006 recommendations included budget increases to support the hiring of more staff attorneys and permanent Board Members, and supported the continued use of temporary Board Members.[150] These recommendations acknowledge that additional resources are required to handle the current BIA caseload beyond those that were allowed for under the 2002 Streamlining Reforms.[151] Not all of EOIR's proposed changes in resources have yet been implemented, however.[152] Though the Director of EOIR announced in March 2007 that the Administration was seeking budget increases that would add 20 new Board staff attorneys,[153] Congress did not appropriate funding for any new positions for fiscal year 2008.[154]

For fiscal year 2009, EOIR did receive an additional $5 million to increase the number of immigration judges and staff.[155] Board personnel estimate that the extra funding should allow for the hiring of about six additional Board attorneys. Our interviews and research have suggested that a staff attorney to Board Member ratio of ten to one (rather than the current 14 to one), assuming that existing regulations and practice governing adjudication remain unchanged, would allow the Board to more adequately address its existing caseload. Approximately 40 additional staff attorney positions would thus be needed to achieve this ratio if the number of permanent Board Members stays as it is currently.

I. Assessing the Harm

In order to recommend solutions to these problems, we must first attempt to assess, if possible, what harm these practices have had on the quality of immigration adjudication. Anecdotal evidence, while helpful, preferably should not be the sole basis to recommend solutions. As has been documented by others, however, empirically measuring the costs of the BIA's current practices is quite difficult. In our view, the best available data for measuring the costs imposed by the current adjudication rules likely are: (1) the rate at which appeals from Board decisions are filed with the Courts of Appeals; (2) the frequency of Board reversal or remand by those Courts; (3) evidence that certain processes implemented by the Board generate results that unfairly favor the government at the expense of the noncitizen; and (4) the continued existence of decisional disparity among immigration judges. We discuss the data we were able to gather below.

1. Appeals to Federal Courts

As Table 3-3 illustrates, the rate at which applicants appealed BIA decisions to the federal circuit courts increased dramatically immediately after the 2002 Streamlining Reforms were implemented:

To many, this sustained increase in the appeal rate demonstrates that the 2002 streamlining processes left BIA appellants newly dissatisfied with the quality of the Board's adjudication, especially because the appeal rate doubled immediately following the 2002 Streamlining Reforms and has not decreased since.[156] Many hypothesized that Board decisions were being appealed more often than historically normal because single-member decisions were more likely than panel opinions to contain errors, and that the newly imposed elimination of de novo review meant that erroneous IJ decisions were frequently being "rubber stamped" by a BIA unable to or unwilling to seriously consider the case below.[157] Many also argued that, even if the

149 Marks, *supra* note 143, at 11-12.

150 *See* Memorandum from the Attorney General, *supra* note 61, at ¶¶ 16, 17.

151 *See* Fact Sheet, Executive Office for Immigration Review, *supra* note 67, at ¶¶ 16, 17 (continuing the use of "temporary" Board Members).

152 TRAC Immigration, Bush Administration Plan to Improve Immigration Courts Lags (2008), *available at* http://trac.syr.edu/immigration/reports/194/ ("[T]he Justice Department has failed to implement measures that would increase oversight of immigration judges, to make the immigration appeals process more rigorous, or to consistently seek funding for additional judges.").

153 *Id*. at 3.

154 *See* Fact Sheet, Executive Office for Immigration Review, *supra* note 67, at ¶ 16.

155 *See* Fact Sheet, Executive Office for Immigration Review, *supra* note 29, at 4.

156 Palmer et al., *supra* note 99, at 55 n.248; *see also* Ramji-Nogales et al., *supra* note 11.

157 *See, e.g., Immigration Litigation Reduction: Hearing on S. 2611 Before the S. Comm. on the Judiciary*, 109th Cong. 50 (2006) (statement of Judge Carlos T. Bea, Circuit Judge, United States Court of Appeals for the Ninth Circuit) ("[P]etitioners and their attorneys do not think the one-judge BIA review and adoption procedure has adequately dealt with the claimed errors on appeal. They think they have received 'rubber stamp' treatment."), *available at* http://www.access.gpo.gov/congress/senate/pdf/109hrg/28339.pdf.

Table 3-3[158]
BIA Decisions Appealed to the Courts of Appeals: 1998-2008

FISCAL YEAR	BIA COMPLETIONS	APPEALS TO THE CIRCUIT COURTS	RATE OF APPEAL
1998	28,763	1,936	6.7%
1999	23,011	1,731	7.5%
2000	21,380	1,723	8.1%
2001	31,800	1,760	5.5%
2002	47,326	4,449	9.4%
2003	48,042	8,833	18.4%
2004	48,698	10,812	22.2%
2005	46,338	12,349	26.6%
2006	41,475	11,911	28.7%
2007	35,394	9,123	25.8%
2008	38,369	10,280	26.7%

Board's review was not in actuality generating incorrect results, single-member decisions and AWOs denied applicants the perception that justice had been done, thus giving them equal incentive to appeal as when there are clearly erroneous decisions.[159]

In contrast to this explanation, EOIR management and some others attributed the spike in circuit court appeals not to deficiencies in BIA decision making but rather to behavioral changes by noncitizens and their advocates in response to the government's attempt to reduce the time taken to decide cases.[160] According to this theory, prompt Board decisions were driving noncitizens to rely on petitions for review — and on the courts of appeals' willingness to stay removals while adjudicating these petitions — as a new mechanism for delaying their removal.[161] Professor Stephen Legomsky,

158 Data regarding the number of BIA completions was obtained from the most recent EOIR Statistical Year Book in which such information is available. *See* http://www.usdoj.gov/eoir/statspub/syb2000main.htm (last visited Dec. 23, 2009). The number of appeals to the Circuit Courts for a given year was obtained from the U.S. Courts Annual Report of the Director for that year. *See, e.g.*, U.S. COURTS, 2008 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS tbl. B-3 (2009) (2008 data), *available at* http://www.uscourts.gov/judbus2008/contents.cfm.

159 Palmer et al., *supra* note 99, at 54 (citing the ABA COMMISSION ON IMMIGRATION POLICY, PRACTICE & PRO BONO, SEEKING MEANINGFUL REVIEW: FINDINGS AND RECOMMENDATIONS IN RESPONSE TO DORSEY & WHITNEY STUDY OF BOARD OF IMMIGRATION APPEALS PROCEDURAL REFORMS (2003), *available at* http://www.abanet.org/immigration/bia.pdf).

160 We recognize that in order to isolate the possible effects of behavioral changes by noncitizens and their advocates, it would have been helpful also to have analyzed the rates of appeal by pro se litigants. Unfortunately, such data are not publicly available.

161 *See* U.S. DEPT. OF JUSTICE, EOIR, FACT SHEET: BIA STREAMLINING (2004), *available at* http://www.usdoj.gov/eoir/press/04/BIAStreamlining2004.htm; *see also Immigration Litigation Reduction*, *supra* note 158, at 50 ("During that period of delay, events may change the alien's chances of staying in the country. Those changes may be personal, such as marriage to a United States citizen or the birth of children or any number of other conditions affecting removability. Or those changes may be political, such as changed country conditions in the alien's home country, or legislative and administrative, such as immigration reform in this country, giving the alien new hopes to remain here.").

for one, has acknowledged the persuasiveness of EOIR's explanation, noting that "[o]ne who is currently receiving a benefit from the government generally has an interest in prolonging a governmental decision whether to terminate that benefit, even though that interest might be partly offset by a longing for the certainty that a final decision will bring."[162] Others have suggested that the possibility of a legislatively enacted immigration amnesty also created a new incentive to appeal so that those applicants could potentially take advantage of any such amnesty if it were enacted.[163] These arguments, however, while reasonable, have not been tested empirically.

In the most in-depth study to date on the reason for the increase in circuit appeals for immigration cases, Professor Yale-Loehr and others used data from the federal courts, EOIR, and DHS to determine whether decision making by a single Board Member, the availability of AWOs, and the elimination of de novo review were factors leading to the rate increase.[164] Notably, however, this study detected no statistically significant differences between the appeal rates of single-member decisions and three-member decisions, or between the appeal rates for AWOs, as compared to written opinions.[165] Instead, the analysis concluded that the increase in circuit appeals largely resulted from a strategy shift by immigration lawyers and their clients after the 2002 Streamlining Reforms that caused them to focus their litigation efforts in the courts of appeals for the first time:

> Lawyers who had become accustomed to the BIA's case processing time before 2002 suddenly faced hundreds of BIA decisions, and thirty-day deadlines for filing petitions for review. Moreover, until the facial challenges were rejected by the Courts of Appeals, many of these new decisions were arguably vulnerable to attack regardless of the merits of the underlying cases. Indeed, many lawyers felt a deep sense of injustice at the BIA's procedures, and were probably eager to challenge them as a matter of principle. As a result, lawyers must have started to reflexively file petitions for review, to expand their practices in the Courts of Appeals, and to begin passing cases on to anyone else who had time to take them.[166]

This shift may have been self-perpetuating because:

> the increased capacity to litigate in the Courts of Appeals may have a vacuum-like tendency to keep itself full. Lawyers are less afraid of adverse precedent, they have become comfortable with petitions for review, and they have geared their practices toward filing a large number of them. Clients may be demanding to go forward with petitions regardless of whether or not they have a realistic chance of success.[167]

---

162 Stephen H. Legomsky, *Forum Choices for the Review of Agency Decisions: A Study of the Immigration Process*, 71 IOWA L. REV. 1298, 1330 (1986).

163 *See* David Martin, *Major Developments in Asylum Law over the Past Year*, 83 INTERPRETER RELEASES 1889 (2006) ("President George W. Bush's support for some form of legalization for persons unlawfully present has been obvious since 2001 . . . . Moreover, a bill ultimately did pass the Senate in May 2006 that includes a 'path to citizenship' for persons illegally present for a number of years and not subject to final orders of removal, although prospects for House agreement appear slim at the moment. In short, the BIA's new procedures and its backlog clearances were taking place at exactly the time when the wider immigration reform debate provided additional incentives to appeal in order to avoid finality of the removal order and to keep the individual in the United States for any possible amnesty.").

164 Palmer et al., *supra* note 99, at 59.

165 *Id.* at 61. The authors admitted that the study, for various reasons, including the sample size, might not adequately measure the effect of the procedures and that a more controlled experiment was needed. *Id*. ("For the comparison between single-member and three-member decisions, the sample tells us very little because it contains so few single-member decisions that we were very unlikely to detect a statistically significant result even if one existed. For the comparison between decisions with and without opinions, our sample was not large enough to rule out a relatively small difference in appeal rates. However, we can rule out a large difference.").

166 *Id*. at 87.

167 *Id*. at 88.

Those interviewed agreed with this explanation: appeals of Board decisions to the Courts of Appeals have become an essentially permanent part of immigration adjudication. Therefore, while strong, well-reasoned decisions authored by a BIA panel may dissuade some from appealing a Board decision, adopting changes at the Board in the hope that such changes will themselves work a dramatic decrease in the volume of appeals, rather than occasion a marginal decrease over time, may well be unsuccessful in achieving that result.

2. Reversal and Remand Rates

Many predicted that the streamlining reforms adopted in 1999 and 2002 would generate higher rates of reversals and remands at the courts of appeals.[168] Nevertheless, notwithstanding withering criticism from some circuit court panels,[169] and rates of reversal within some circuits that have neared 40%, the average rate among all circuit courts at which Board decisions are reversed and remanded does not substantially differ from the rates at which other types of cases are reversed and remanded — and appears to be generally

Table 3-4[170]
Reversal and Remand Rates by Circuit Courts: 2004-2008

SOURCE OF APPEAL	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
BIA	14.4%	16.4%	17.5%	15.3%	12.6%
Criminal	8.1%	20.7%	11.9%	8.2%	9.2%
U.S. Prisoner Petitions	12.3%	11.8%	9.4%	10.6%	13.0%
Other U.S. Civil	15.0%	14.3%	14.4%	14.8%	15.3%
Priv. Prisoner Petitions	12.3%	13.7%	11.8%	13.5%	11.47%
Other Private Civil	15.1%	15.5%	14.2%	14.8%	15.3%
Bankruptcy	17.8%	17.7%	16.1%	13.2%	16.5%
Administrative Appeals	11.7%	13.8%	14.7%	15.1%	12.2%

168 ACLU Streamlining Comments, *supra* note 112, at 4 ("Decisions affirmed without critical debate will not only result in injustice in that particular case but will also frustrate the goal of more timely adjudication. Federal courts are far more likely to overturn decisions that have not been subject to more than cursory review."); AILA Streamlining Comments, *supra* note 94, at 17 ("Use of appellate panels and the filing of dissenting opinions also promote efficiency when the decisions are subject to review by federal judges. Panels promote a full exploration of all aspects of a case, and the existence of dissenting opinions offers proof that divergent views were considered on appeal. This process makes is less likely that a federal court will overturn or remand a decision for failure to consider the proper facts and law.").

169 *See, e.g.*, Benslimane v. Gonzales, 430 F.3d 828, 829 (7th Cir. 2005) (cataloging some of the "severe" criticism of the Board); Wang v. Attorney General of the United States, 423 F.3d 260, 267 (3d Cir. 2005) (criticizing the Board's summary decision regarding credibility, finding that the alleged inconsistencies in testimony relied upon by the Board did not amount to inconsistencies "[n]or is their inherent implausibility evident to us."); Galina v. INS, 213 F.3d 955, 958 (7th Cir. 2000) (finding that the analysis of the BIA was "woefully inadequate" and that "elementary principles of administrative law, the rules of logic, and common sense seem to have eluded the [BIA] in this as in other cases").

170 The underlying data in Table 3-4 contain some limitations. The remand/reversal rates for all categories except the BIA were determined by dividing the number of remands and reversals by the total number of cases terminated on the merits for each respective proceeding, as extracted from Appendix Table B-5 of the U.S. Courts Annual Report of the Director for each respective year. *See* www.uscourts.gov/judbususc/judbus.html (last visited Dec. 23, 2009). The data regarding 2004 and 2005 reversal and remand rates for the BIA were obtained from a separate source, and pertain only to asylum cases. *See* Ramji-Nogales et. al., *supra* note 11, at 362 tbl. 2. The 2006-2008 data, on the other hand, were obtained from a third source and reflect all case types. *See* John Guendelsberger, *Circuit Court Decisions for December 2008*, IMMIGRATION LAW ADVISOR, Jan. 2009, at 6, *available at* http://www.justice.gov/eoir/vll/ILA-Newsleter/ILA%202009/vol3no1.pdf.

consistent with the overall reversal rate for federal administrative action generally.

Reversal and remand rates, however, do not themselves fully correlate with the actual rate of error by the BIA given the deferential appellate standard of review that limits appellate courts to reviewing BIA decisions for whether substantial evidence supports the BIA or IJ's decision, and not for whether the decision was accurate in all respects. In addition, these data do not seem to account for vacaturs stipulated by settlement or other cases terminated for reasons other than the merits, and the available BIA data do not distinguish between reversals and remands for additional factual development.[171] Furthermore, there are significant disparities among the circuit courts themselves, both in the volume of cases reviewed and the reversal rate. In 2008, the Second Circuit and Ninth Circuit together accounted for nearly 70% of total decisions, and 80% of all reversals or remands. In that year, the Ninth Circuit received 2023 appeals, and the Second Circuit, 1110. The next highest volume of cases decided was the Third Circuit with 422 cases, followed by the Eleventh Circuit with 225. No other circuit decided more than 200 cases, and the Tenth Circuit decided only 55. The reversal and remand rates, however, do not correlate with the volume of cases

Table 3-5[172]
Reversal and Remand Rates by Circuit: FY 2006-2008

CIRCUIT	FY 2006	FY 2007	FY 2008
1st	7.1%	3.8%	4.2%
2nd	22.6%	18.0%	11.8%
3rd	15.8%	10.0%	9.0%
4th	5.2%	7.2%	2.8%
5th	5.9%	8.7%	4.2%
6th	13.0%	13.6%	12.0%
7th	24.8%	29.2%	17.1%
8th	11.3%	15.9%	8.2%
9th	18.1%	16.4%	16.2%
10th	18.0%	7.0%	5.5%
11th	8.6%	10.9%	8.9%
Overall:	**17.5%**	**15.3%**	**12.6%**

171 *See, e.g.*, John R. B. Palmer, *The Immigration Surge In The Federal Courts Of Appeals*, 11-2 BENDER'S IMMIGR. BULLETIN, January 15, 2006, at 2 (In noting "no indication of an increase in the rate of reversals or vacaturs" after the 2002 streamlining reforms, the author admitted that "an objective measure of the error rate is difficult to obtain. Although the error rate might be estimated by the rate at which BIA decisions are reversed or vacated in the courts of appeals, the available data on such reversals and vacaturs was limited in that (1) vacaturs stipulated in settlement agreements are currently difficult to count, and (2) many of the BIA's post-2002 decisions are still under review."). Rather surprisingly, given the level of criticism directed at the Board's processes, data on how frequently decisions of the Board have been reversed or remanded by the appellate courts are not publicly available. Despite the difficulties in obtaining such data, we have assembled the chart above from the sources indicated in note 170, *supra*.

172 All data in Table 3-5 were obtained from Guendelsberger, *supra* note 170, at 6.

decided: indeed, the circuit most skeptical of the BIA — the Seventh Circuit — and most prone to reverse or remand, decides a relatively low volume of immigration cases.

Thus, while the data that are available do not suggest that the Board's processes are generating reversals or remands at a rate that greatly exceeds those of other courts or adjudicatory bodies, it is difficult to draw conclusions from these data about whether the Board's processes are generating incorrect results at a higher rate than typical of other federal administrative bodies.

3. Current BIA Processes Appear to Favor the Government

Some studies have suggested that single-member review and AWOs result in decisions that consistently favor the government at the expense of the noncitizen. Both the 2003 study conducted by the law firm of Dorsey & Whitney and the 2007 article on *Refugee Roulette: Disparities in Asylum Adjudication* noted a sudden reduction in the rate at which the Board issued decisions favorable to asylum applicants after the 2002 Streamlining Reforms were adopted.[173] *Refugee Roulette*, for example, found that Board decisions were favorable to applicants in 37% of asylum appeals in 2001, but in only 13% of appeals in 2002, and in just 11% during 2005.[174]

Similarly, a 2008 Government Accountability Office ("GAO") Report found that "of all BIA decisions in asylum appeals from fiscal years 2004 through 2006, 92% of decisions were made by single BIA members, of which 7% favored the alien.[175] In contrast, 8% of decisions were made by panels, with 52% favoring the alien."[176] The same report found that, "[a]lthough the percent of appeals favoring the alien increased significantly over this time period [2004-2006]both for single-member decisions and three-member panel decisions, the increase in decisions favoring the applicant made by three-member panels was significantly greater and doubled during that period."[177] The authors of *Refugee Roulette* found similar results to that of the GAO, finding that between 2003 and 2005, AWOs favored asylum applicants in just 3% of cases.[178] As for opinions authored by single members, just 25% in 2003 and 10% in 2005 favored asylum seekers whereas decisions rendered by panels favored asylum seekers 64% of the time during 2003-2005.[179]

This disparity in outcomes, however, does not prove that three-member panels are necessarily more likely to find in favor of an applicant than one member would. Assuming the Board's screening processes are directing the more complex cases to panels, many of the cases reviewed by single members may be relatively straightforward cases in which relief from removal is simply not warranted.[180] Further, as the authors of *Refugee Roulette* explained, in interpreting the shift in decisions favoring the government after the 2002 Streamlining Reforms, it is difficult to infer injustice from decision rates alone:

> Some might argue that from FY 1998 through FY 2001, the Board was being too generous to asylum applicants and that a rate such as 11% is more appropriate, or that fewer meritorious appeals were filed after FY 2001. We have no way of knowing which rate is a more accurate reflection of justice.[181]

Aside from the difficulty of inferring justice (or its opposite) from statistical data, however, it remains that

---

173 Dorsey & Whitney, *supra* note 34, at 39-40 and App. 24. According to the Dorsey & Whitney report, between June 2000 and October 2002, "the number of appeals granted or remanded (usually, favoring the alien) remained steady: under 1,000 per month . . . . Appeals denied rose from less than 2,000 per month to around 4,000 per month. Before the spring of 2002, approximately one in four appeals was granted; since then [until October 2002] approximately one in ten appeals is granted."

174 Ramji-Nogales et al., *supra* note 11, at 377.

175 2008 GAO Report, *supra* note 84, at 55.

176 *Id*. at 52.

177 2008 GAO Report, *supra* note 84, at 55 tbl. 4.

178 Ramji-Nogales et al., *supra* note 11, at 358. Clearly, because AWOs always are affirmances, these represent cases in which DHS appealed and the BIA found that the immigration judge was correct in granting relief.

179 *Id*. at 356 & fig. 38.

180 Palmer et al., *supra* note 99, at 67.

181 Ramji-Nogales et al., *supra* note 11, at 378.

asylum seekers are granted asylum at a higher rate by panels than by single members. Absent some rational explanation for this difference in results, this data does provide support for making changes at the Board to ensure the method of review does not unduly impact the outcome of an appeal.

4. Decisional Disparity Among Immigration Judges

As was discussed in Part 2 of this Report above, recent studies analyzing rates at which immigration judges grant asylum reveal striking disparities. *Refugee Roulette* found that, in three of the largest immigration courts, more than 25% of the judges had asylum grant rates that deviated from their own court's mean asylum grant rate by more than 50%.[182] Further, female judges grant asylum at a rate 44% higher than that of their male colleagues, and immigration judges with experience working for ICE or its predecessor grant asylum at a significantly lower rate than those with experience practicing immigration law in a private firm, at a nonprofit organization, or working in academia.[183] Grant rates also evince considerable regional disparity; nearly all immigration courts grant asylum at a rate of between 37% and 54%, but four immigration courts — in Atlanta, Miami, Detroit, and San Diego — grant asylum at rates significantly lower than 37%.[184] These disparities appear to have little to do with the merits of the cases before the immigration courts.[185] Although the majority of decisions are not appealed, with respect to those that are appealed, the BIA can perform a valuable, albeit limited, role in reversing outlier decisions, and providing greater stability to the decisions.[186]

IV. Recommendations Relating to the Board of Immigration Appeals

Review of immigration court decisions by the BIA has the potential to reconcile disparities and correct errors in immigration judge decision making before such cases are appealed, if at all, to the federal circuit courts. In the last several years, the Board has instituted several improvements in its processes — such as issuing fewer affirmances without opinions — that help it come closer to achieving this goal than its past practice after the two Streamlining Reforms allowed. Nevertheless, as discussed throughout above, the Board's current review process does not appear to have significantly altered the appeal rate to the circuit courts, or reduced the result of adjudication disparities among the decisions of immigration judges. Furthermore, studies have suggested that single-member review and affirmances without opinion result in decisions that unduly favor the government at the expense of the noncitizen.[187]

Therefore, to help the Board achieve its purpose of crafting uniformity in immigration law, exercising oversight, and correcting the errors of immigration judges, we suggest the following reforms to the Board's processes. These recommendations are most relevant if the broader restructuring proposals articulated in Part 6, *infra*, for an Article I court are not implemented, at least in respect to the Board of Immigration Appeals, and are proposed in the event that the Board continues as an administrative body within the Department of Justice. These recommendations are designed as a series of relatively uncostly measures that would introduce greater confidence in the Board's ability to fairly consider cases.

As noted above, other groups have recommended reform of the Board's decision making processes. The majority of those recommendations largely advocate a repeal of the 2002 Streamlining Reforms rules, on occasion implicitly suggesting that the Board's previous procedures were adequate.[188] As discussed further

182 Ramji-Nogales et al., *supra* note 11, at 373. A recent report published by the Transactional Access Records Clearinghouse (TRAC) concluded that the disparities among the grant rates of IJs in immigration courts may have declined somewhat in recent years. *See* TRAC Immigration, Latest Data from Immigration Courts Show Decline in Asylum Disparity, http://trac.syr.edu/immigration/reports/209/ (June 22, 2009). Among the 15 immigration districts that decide the bulk of all asylum matters, disparity rates in ten of them have declined, though there were some districts where the disparities actually increased. *Id.*

183 Ramji-Nogales et al., *supra* note 11, at 376-77.

184 *Id.* at 375.

185 *See id.* at 363-64 ("We believe that to a large extent, the statistics shown in the table reflect not the relative merits of the cases or the differential grant rates of the immigration judges, but rather the differing attitudes that the judges in these circuits have. . . .").

186 In 2008, only 9% of immigration judge decisions were appealed to the Board. Executive Office for Immigration Review, U.S. Dept. of Justice, EOIR FY 2008 Statistical Year book, at A2 (2008), *available at* http://www.usdoj.gov/eoir/statspub/fy08syb.pdf (last visited Aug. 24, 2009).

187 *See supra* Section III.A.3.

188 *See* Ensuring Fairness, *supra* note 81, at 8. Other recent studies have not stated this explicitly, but have, in substance, recommended a shift back to the pre-2002 procedures without additional modifications. *See, e.g.*, Appleseed, *supra* note 78.

below, our recommendations do not purely align with practice either before or after implementation of the 1999 Streamlining Reforms, recognizing, for instance, that in certain circumstances single-member review may be adequate for limited categories of removal cases. In addition, some of our recommendations address issues that would remain unaddressed by a simple repeal of the 2002 Streamlining Reforms.

A. Require Three-Member Panel Review for Non-Frivolous Appeals

Both anecdotal and empirical evidence indicate that three-member panels provide more transparent, meaningful review than single-member decisions and AWOs.[189] Indeed, the Proposed 2008 Streamlining Reforms, which would provide a Board Member discretion to refer a case to a three-member panel whenever the case "presents a complex, novel, or unusual legal or factual issue," acknowledge that the Board should expand panel review.[190] While the 2008 proposed rule is certainly a step in the right direction, the amorphous standard of a "complex, novel, or unusual legal or factual issue" seems tailor-made for a narrow construction (or a construction varying depending on Board management). In addition, there is little guarantee that Board Members would fully utilize their enhanced discretion to refer cases to three-member panels, rather than deciding them as they currently do, particularly in light of the existing time and resources constraints under which Board Members operate.[191]

Therefore, the Board's existing regulations should be amended to make review by three-member panels the default form of adjudication and to allow single-member review only in very limited circumstances. Such a change would bring Board review in line with the practice of federal appellate courts, in which most cases are decided by a three-judge panel. Panel review should be required for all merits cases unless the appeal is frivolous or there is obvious precedent controlling the issue. "Obvious precedent" would require an absence of any conflicting authority; such practice is consistent with the rule promulgated as part of the 2002 Streamlining Reforms that require panel review to settle inconsistencies among the rulings of different immigration judges or to establish precedent.[192] Single-member review also may be appropriate to decide purely procedural motions and motions that are unopposed by DHS.[193]

Such limits on single-member review would allow for significantly more panel review than exists under the 2002 Streamlining Reforms, though it would not return completely to the levels that existed under the 1999 Streamlining Reforms. Under the 1999 Streamlining Reforms, all cases were heard by three-member panels unless they were part of a relatively narrow category of procedural issues or non-compliant appeals.[194] This proposal thus represents a partial expansion from the category of cases suitable for single-member review articulated in the 1999 Streamlining Reforms. Limiting the scope of three-member panel review to exclude some types of motions and merits appeals is beneficial, however, because it would help limit the resources required for panel review and minimize the likelihood of a return to the backlog typical of the 1990s. Nevertheless, since the expansion of panel review would still affect the

189 *See supra* Section II.C.2.

190 Board of Immigration Appeals: Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents, 73 Fed. Reg. 34,654, 34,655, 34,658 (June 18, 2008).

191 *See* Letter from Thomas M. Susman, ABA Director, Government Affairs Office, to John Blum, Acting Gen. Counsel, EOIR (Aug. 18, 2008) ("In the face of what is still a massive backlog of 27,000 pending cases, it is unlikely that this new flexibility will be widely utilized. The modified process will still place considerable pressure upon members to conduct single-member review or issue AWOs"). However, as discussed in note 89, *supra*, it is not entirely clear what percentage of the "pending" cases are part of any backlog rather than simply part of the Board's active docket, and some have claimed that the backlog has disappeared entirely.

192 8 C.F.R. § 1003.1(e)(6).

193 A similar proposal was recently endorsed by Appleseed. *See* APPLESEED, *supra* note 78, at 33. In addition, the ABA has previously recommended that, with very limited exceptions, three-member panels should preside over all cases, although this recommendation is a subset of a recommendation to completely repeal the 2002 Streamlining Reforms. *See* ENSURING FAIRNESS, *supra* note 81, at 8. Restoration of three-member review has also been supported by Human Rights First. HUMAN RIGHTS FIRST, HOW TO REPAIR THE U.S. ASYLUM SYSTEM: BLUEPRINT FOR THE NEXT ADMINISTRATION 9 (2008).

194 Dismissal by a single-member was appropriate in certain categories of cases including, *inter alia*, cases in which the BIA lacks jurisdiction, untimely appeals, cases in which the alien has filed an appeal from an immigration judge's entry of an order in absentia in removal proceedings, appeals failing to meet essential regulatory or statutory requirements, appeals from orders granting the requested relief, and appeals filed with the Board in which the Notice of Appeal fails to specify any grounds for appeal. Board of Immigration Appeals: Streamlining, 64 Fed. Reg. at 56,141; *see also* Memorandum from Paul W. Schmidt, Chairman of the BIA, to all BIA Members (Aug. 28, 2000).

majority of the Board's docket, this recommendation would realistically require an accompanying increase in the number of Board attorneys and likely additional Board Members. Instituting panel review of most appeals without at the same time substantially increasing the number of Board Members and staff attorneys would undoubtedly lead to the mounting backlog that triggered the 1999 and 2002 reforms.

B. Improve the Quality of Board Decisions

1. Require that Written Decisions Respond to all Non-Frivolous Arguments Raised by the Parties

While the 2008 Proposed Streamlining Reforms would encourage the use of written opinions, rather than AWOs, they do not delineate any requirements for how such opinions should be written. The current practice at the Board is to address all issues perceived by the adjudicator to be "dispositive," but not to engage every argument an applicant makes. This practice, if followed diligently, could provide applicants in most cases with sufficient information to understand the Board's decision making. However, given the prevalence of pro se applicants and the widespread perception among practitioners that the Board is not fulfilling its function of reviewing immigration court decisions, the Board should be held to a higher standard. The Board's existing regulations should be amended to require that Board opinions respond to all non-frivolous arguments properly raised by the parties in all cases.[195] Opinions need not repeat the statement of facts or conclusions of law written by the immigration judge, but they should respond explicitly to all non-frivolous contentions that the parties made during their appeals to the BIA, and not merely to those the adjudicator perceives to be dispositive.

More developed opinions are important if losing parties and their counsel are to believe that they were heard and understood. If the Board addressed all contentions that are properly raised, then the rate of appeals from the Board to federal court might decline, given that a comprehensive and thoroughly developed opinion would give less cause to believe an appeal might be successful. Even if more substantial opinions do not in themselves lead to reduced appeals, the Courts of Appeals would have a clearer and more complete statement of views from the Board that would place them in a better position to decide whether to affirm or remand the Board's decision.

2. If Retained, Make Affirmances Without Opinions Discretionary Rather than Mandatory

In recent years, case management practices at the Board have significantly reduced the number of AWOs to less than 5% of all Board decisions. Although the 2002 Streamlining Reforms require an AWO if the appeal meets certain regulatory criteria, current Board practice gives Board Members discretion to decide whether to issue an AWO or to issue a short written opinion. Nevertheless, it would be better if this management practice were reflected in the Board's regulations, as the Board's internal procedures could be too easily changed in response to new administration policy, increased time pressures, or an expanded docket. Furthermore, formally codifying this informal procedure would promote awareness of the Board's change in practice and help improve the reputation of the Board, which was badly damaged in the last decade due to the proliferation of AWOs. Therefore, in the event that our recommendations are not adopted regarding the expansion of panel review and/or the requirement that opinions address all issues, the Department of Justice should at a minimum finalize the portion of the Proposed 2008 Streamlining Reforms that would make affirmances without opinions discretionary rather than mandatory.

C. Permit De Novo Review of Immigration Judge Factual Findings and Credibility Determinations

Allowing the Board to review de novo and correct immigration judge factual findings and credibility determinations would help reduce the current disparity among immigration judge decisions and decrease the chance that applicants will be harmed by erroneous decision making. The traditionally deferential standard applied during appellate review, while appropriate for appellate courts of general jurisdiction, is not a good fit for the Board's function. In contrast to traditional trial courts, immigration court hearings use informal procedures, and a significant number of respondents are unrepresented or badly represented by

195 Human Rights First has, similarly, recommended that the Board be required to "provide the full legal basis for their decisions and address the arguments made by the parties." HUMAN RIGHTS FIRST, *supra* note 193, at 9.

inexperienced or ill-prepared attorneys. The practice of immigration judges dictating their decisions from the bench further increases the possibility for error in fact and credibility determinations. Moreover, given that much immigration court testimony is given through a translator and that cultural differences may affect demeanor and behavioral cues in a way that can make the noncitizen seem untruthful, de novo review of a transcript can be a valuable method for evaluating credibility in immigration proceedings.[196]

D. Relax Time Limits on Board Members

The time limits imposed on Board Members to issue decisions (90 days for single-member review and 180 days for panel review), although they arguably may have been necessary to aid in clearing the longstanding backlog, should now be relaxed. At least the same amount of time to decide appeals should be granted to single members as is currently allowed to three-member panels. Allowing more time for single-member review would provide the resources and time for Board Members to issue longer, more detailed opinions that provide noncitizens and their counsel greater assurance that their arguments were fully considered.[197] Current Board processes provide for consultation between the staff attorneys and between Board Members, even in decisions ultimately authored by single members rather than panels, and such consultation improves the Board's decision making. Mandating that decisions be issued within 90 days, however, necessarily limits the time for such consultation, and implicitly discourages it from occurring. Doubling the current time allotted for single-member review will promote this process and thereby enhance the Board's decision making, without unduly extending the decision making process.[198]

E. Encourage Publication of Precedent Decisions and Increase Access to Non-Precedent Decisions

Given the importance of BIA precedent to noncitizens, asylum officers, immigration judges, and all parties involved in the immigration adjudication process, the relatively minimal amount of BIA precedent is a serious problem.[199] A substantial body of Board precedent could provide a solid, orderly body of law. Such law would facilitate efforts to minimize disparity among immigration judges, decrease both the number of appeals and the rate of reversals, and decrease the frustration and cost of representing noncitizens in the immigration adjudication process.

Increased precedent should not come at the cost of full Board review, however. Because Board precedent can have a far-reaching effect, the input of the full Board is essential before issuing a precedent opinion.[200] Therefore, the Attorney General should continue to encourage the Board to publish more precedent decisions, while preserving the existing regulatory requirement that the entire Board authorize the designation of an opinion as precedential.

Further, wherever possible, non-precedential opinions should be made available to applicants and their attorneys. The Board currently maintains an internal database of all decisions it has issued. Although some expense would be required to redact these decisions for the public (as opinions regarding asylum and withholding of removal claims are confidential to the parties),[201] advocates and applicants often are not as familiar with the specifics of immigration law as could be desired. A free, publicly available source of recent decisions would be very useful to these parties and would likely improve the quality of the briefs and applications submitted to the immigration courts and the BIA.

---

196 *See supra* Section II.C.4.

197 Human Rights First has recognized the need for the Board to have adequate time to hear and evaluate each case, but does not advocate for a specific period of time. *See* HUMAN RIGHTS FIRST, *supra* note 193, at 9.

198 The regulations allow for these time periods to be extended for up to 60 days by the Board Chairman in "exigent circumstances." This extension is generally used for the issuing of precedential decisions. *See* Baldini-Potermin, *supra* note 32, at 2012. This authority is insufficiently flexible to allow for extended decision making.

199 *See supra* Section II.C.6.

200 Under current practice, the permanent members of the Board meet once a week en banc to review and vote on three-member panel publications to designate as precedential. Although unanimity is not required, a clear majority of the permanent members must vote in favor for a decision to be published as precedent. *See* Baldini-Potermin, *supra* note 32, at 2012.

201 *See* 8 C.F.R. § 208.6.

F. Apply to Board Members the Code of Conduct Proposed for Immigration Judges in Part 2 of this Report

As is discussed in detail in Part 2 of this study, EOIR has made some progress on developing a Code of Conduct for adjudicators within EOIR. The proposed Code of Conduct, however, is not well-tailored to the demands of EOIR adjudicators. We recommend that the consolidated code of conduct for immigration judges, based on the ABA Model Code of Judicial Conduct, and recommended in Part 2, be applied to Board Members as well.

G. Increase the Resources Available to the Board

Lastly, whether or not the reforms outlined above are implemented, the Board would benefit from increased resources to fund additional support staff. EOIR announced in March 2007 that it was seeking budget increases that would allow for an additional 20 Board staff attorneys. Though EOIR recently received some additional funding under the 2009 Omnibus Appropriations Act, the extra funding will likely only allow for hiring six additional attorneys. Based on our interviews and assessment, we think that a ratio of ten staff attorneys to one Board Member (assuming existing regulations and practice remain unchanged) would be more appropriate than the current ratio; meeting that ratio would require the hiring of approximately 40 additional staff attorneys. Congress should appropriate the necessary funding for these additional 40 positions, and for more positions if the scope of panel review is expanded as outlined in the recommendations above.[202]

202 Appleseed recommends the hiring of 110 new staff attorneys if the Board returns entirely to three-member review and eliminates entirely the use of AWOs. *See* APPLESEED, *supra* note 78, at 34.

4

Judicial Review By Circuit Courts

Reforming the Immigration System

Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases

Prepared by Arnold & Porter LLP for the
American Bar Association Commission on Immigration

American Bar Association
Commission on Immigration
740 Fifteenth Street, NW
Washington, DC 20005-1022
202-662-1005

Part 4: Judicial Review By Circuit Courts
Table of Contents

I. Introduction on Judicial Review by Circuit Courts....4-3
II. Background on Judicial Review by Circuit Courts....4-5
A. Judicial Review Prior to 1996....4-5
B. The 1996 Amendments to the INA: AEDPA and IIRIRA....4-6
C. The REAL ID Act of 2005....4-8
III. Issues Relating to Judicial Review by Circuit Courts....4-9
A. The Elimination of Judicial Review of Discretionary Decisions Is Overbroad....4-9
B. By Stripping Habeas Corpus Jurisdiction and Restricting Remand, Congress Has Virtually Eliminated Courts' Ability to Order Fact Finding....4-12
1. Habeas Jurisdiction and Circuit Court Review through 1996 and in 2005....4-12
2. Court of Appeals Review is Inadequate Where Additional Fact Finding is Necessary....4-14
C. The 30-Day Deadline for Filing Petitions for Review Frustrates Judicial Review....4-16
D. Perspectives on the Increased Immigration Case Load at the Courts of Appeals....4-17
E. Assessment of Consolidation of Immigration Appeals in One Circuit....4-18
IV. Recommendations Relating to Judicial Review by Circuit Courts....4-20
A. The 1996 Amendments Precluding Judicial Review of Certain Discretionary Decisions Should be Repealed....4-20
B. Congress Should Allow Courts of Appeals to Remand to the BIA for Further Fact Finding in Sufficiently Compelling Circumstances....4-21
C. The Deadline for Filing a Petition for Review to the Courts of Appeals Should Be Extended to 60 Days with a Provision to Request Additional Time, and a Final Removal Order Should Specify the Circuit for Appeal....4-21
APPENDIX OF TABLES – JUDICIAL REVIEW BY CIRCUIT COURTS....4-23
Table 4-1: BIA Decisions Appealed to Court of Appeals: 1998-2008....4-24
Table 4-2: Total Appeals by Circuit: 2000-2008....4-25
Table 4-3: Reversal and Remand Rates for Asylum Cases by Circuit Court: 2004-2005....4-28

Part 4: Judicial Review By Circuit Courts

I. Introduction on Judicial Review by Circuit Courts

In 1996, Congress fundamentally altered judicial review of removal decisions, significantly restricting noncitizens' access to the federal courts. The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") barred judicial review of removal orders for noncitizens convicted of certain crimes and challenges to certain discretionary acts of the Attorney General. These amendments to the immigration laws directed all federal court review, to the extent still permitted, to the courts of appeals.

However, Congress's 1996 legislation did not sufficiently consider the constitutional limitations of precluding judicial review of removal orders. The Supreme Court held in 2001 that the preclusion of direct review in the courts of appeals did not bar challenges to removal orders within the traditional scope of habeas corpus jurisdiction in the district court.[1] The Supreme Court noted that habeas corpus jurisdiction might be precluded if an adequate substitute was provided.[2] In 2005, Congress decisively eliminated habeas jurisdiction for removal orders (except expedited removal) but provided for circuit court review of constitutional claims and questions of law that were previously available under habeas on the theory that the courts of appeals would then serve as an adequate substitute for habeas review.

Thus, today the principal vehicle for judicial review of a removal order is a petition for review, which must be filed with the court of appeals in the circuit in which the removal hearing was held. The petition must be filed within 30 days of the final order of removal, and this deadline cannot be extended even if good cause is shown. If these procedural requirements are met, the petitioner must then demonstrate that the appeal is not subject to one of the numerous jurisdictional bars.

Consequently, there is now a convoluted labyrinth of case law construing the exceptions (and constitutionally required carve-outs to these exceptions) to judicial review of removal orders. Petitioners and the courts of appeals spend valuable time wending their way through this jurisdictional thicket. As a result, judicial resources are not conserved, and it is questionable whether the objective of executing removal orders with dispatch has been achieved. Instead, the exceptional scope of the restrictions on judicial review undermines confidence in the entire adjudication system, as these restrictions are perceived as a mechanism to insulate dysfunctional administrative processes and questionable exercise of executive discretion.

The judicial review that has occurred illustrates its necessity. Circuit court decisions have been highly critical of the administrative review process, finding "manifest errors of fact and logic,"[3] "[a] disturbing pattern of [immigration judge ("IJ")] misconduct,"[4] and bias and abusive conduct.[5] In *Galina v. INS*, the Seventh Circuit found that the "[Board of Immigration Appeals ("BIA")] analysis was woefully inadequate" and that "elementary principles of administrative law, the rules of logic, and common sense seem to have eluded the [BIA] in this as in other cases."[6] Five years later in *Benslimane v. Gonzales*, Judge Posner noted, "different panels of this court reversed the [BIA] in

1 INS v. St. Cyr, 533 U.S. 289, 304-5 (2001).

2 *Id.* at 314 n.38 ("Congress could, without raising any constitutional questions, provide an adequate substitute [for habeas corpus] through the courts of appeals.").

3 Iao v. Gonzales, 400 F.3d 530, 533-35 (7th Cir. 2005) (remanding to the Board of Immigration Appeals because Iao was entitled to a "rational analysis of the evidence" that had been denied to him).

4 Wang v. Attorney Gen., 423 F.3d 260, 268 (3d Cir. 2005).

5 *See, e.g.*, Fiadjoe v. Attorney Gen., 411 F.3d 135, 155 (3d Cir. 2005) ("The conduct of the IJ by itself would require a rejection of his credibility finding."); Lopez-Umanzor v. Gonzales, 405 F.3d 1049, 1054 (9th Cir. 2005) (IJ's determination was "skewed by prejudgment, personal speculation, bias, and conjecture"); Zhang v. Gonzales, 405 F.3d 150, 158 (3d Cir. 2005) (IJ sought to "undermine and belittle" the petitioner's testimony); Dia v. Ashcroft, 353 F.3d 228, 250 (3d Cir. 2003) (IJ's opinion "consist[ed] not of the normal drawing of intuitive inferences from a set of facts, but, rather, of a progression of flawed sound bites that [gave] the impression that she was looking for ways to find fault with Dia's testimony"); Reyes-Melendez v. INS, 342 F.3d 1001, 1007 (9th Cir. 2003) (IJ abandoned role as neutral fact finder by her "sarcastic commentary and moral attacks").

6 Galina v. INS, 213 F.3d 955, 958 (7th Cir. 2000).

whole or part in a staggering 40% of the 136 petitions to review the Board that were resolved on the merits."[7] While these numbers only reflect reversals by the Seventh Circuit, many judges have criticized the administrative adjudication process.[8]

These scathing decisions not only prevented manifest injustice in individual cases, but they also illuminated certain problems in the immigration adjudication process. Meaningful judicial review plays an indispensable role in implementing the rule of law and checking administrative caprice. For many noncitizens, it is the right to go before a judge that differentiates the United States from other countries that lack the same commitment to the rule of law.

The need for reform that would ensure efficacy, restore public confidence, and safeguard due process in immigration adjudication has been apparent for many years. Given the judiciary's critical oversight of, and dialogue with, the administrative process, the role of judicial review warrants serious consideration. In this Part 4, we discuss express restrictions on judicial review and the procedural rules that frustrate meaningful review.

Any evaluation of proposals to expand judicial review must take into consideration the potential for further increasing the burden on the courts of appeals. As discussed in Part 3 of this Report, perceptions regarding the quality and fairness of the administrative adjudication process appear to affect the rates of appeals to the courts of appeals. In the past decade, the rate of BIA decisions being appealed has increased dramatically from 7.5% in the late 1990s to a high of 28.7% in 2006.[9] In 2008, over 10,000 BIA decisions were appealed, comprising 16.8% of the civil appeals docket of the courts of appeals.[10] This figure is largely representative of the rate since 2004. The Second and Ninth Circuits have been the most significantly impacted, with immigration cases accounting for approximately 35-40% of each of their civil appeal dockets in the last few years.[11] Various experts and commentators, including the American Bar Association ("ABA") Commission on Immigration, have attributed the increase in circuit court appeals to a number of factors, including an increase in immigration cases overall and a qualitative change in the decision making in the administrative process, particularly the BIA's use of summary affirmances and streamlining, that fosters the perception that the process is not fair.[12]

To address the high volume of cases before the courts of appeals, some have suggested legislation to consolidate immigration appeals in an existing circuit or in an entirely new circuit. The burden would then be shifted to a court of appeals (which, under present appeal rates, would be the largest circuit court) that would develop greater expertise and efficiency in deciding appeals, and, over time, this change would result in a more uniform and consistent body of law. Consolidation, however, addresses the symptoms of high appeal rates and not the underlying dissatisfaction with the administrative process. A number of circuit court judges opposed consolidation when it was proposed in 2006, in part because of concerns over losing the value of having generalist judges deciding issues involving personal liberty. Moreover, conflicts among circuits serve a useful purpose in debating and illuminating the impact of substantive legal rules.

While caseload must necessarily be a consideration, we conclude that the availability of judicial review should not fluctuate depending on the burden imposed on the federal courts. Any expansion of judicial review need not result in a greater burden on the federal courts if the other steps in the administrative process are also

---

7 Benslimane v. Gonzales, 430 F.3d 828, 829 (7th Cir. 2005). *See also* Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295, 364 (2007) (regarding rates of reversal in asylum cases). For an expanded version of the Refugee Roulette study, with commentary by scholars from Canada and the United Kingdom as well as from the United States, please see Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform (NYU Press 2009).

8 *See Immigration Litigation Reduction: Hearing Before the S. Comm. on the Judiciary*, 109th Cong., Second Session at 5-6 (April 3, 2006) [hereinafter *Litigation Reduction Hearing*], *available at* http://www.access.gpo.gov/congress/senate/pdf/109hrg/28339.pdf (last visited April 5, 2009) (noting that the "performance and productivity of the IJs and the BIA" is the "core problem in immigration adjudications"). *See also* notes 3-7, *supra*, and accompanying text.

9 Table 4-1. The Appendix to this part of the Report includes the cited tables.

10 *Id.*

11 Table 4-2.

12 ABA Commission on Immigration Policy, Practice and Pro Bono, Seeking Meaningful Review: Findings and Recommendations in Response to Dorsey & Whitney Study of Board of Immigration Appeals Procedural Reforms 2-4 (2003), *available at* http://www.abanet.org/publicserv/immigration/bia.pdf.

reformed and, most importantly, adequately funded. Moreover, whether a noncitizen is represented by counsel affects the quality of adjudication at each step of the administrative process, all the way through review by the courts of appeals. If more noncitizens were represented at the earlier stages of the administrative process (in Part 5 of this Report, we recommend requiring such representation for certain types of proceedings and to certain groups of individuals), we would expect fewer federal court appeals and more confidence in the entire process.

II. Background on Judicial Review by Circuit Courts

Two conflicting themes have emerged in the jurisprudence regarding immigration and the constitutional rights of noncitizens. On the one hand, the legislative and executive branches are said to enjoy "plenary power" to make and execute policy for the admission and expulsion of noncitizens with little interference from the judiciary.[13] Relying on this doctrine, courts have historically not engaged in the kind of searching review of immigration statutes and decisions that might be applied to other legislation or governmental acts.[14] In one opinion, the Supreme Court refused to assert judicial authority on the ground that immigration decisions "are frequently of a character more appropriate to either the Legislature or the Executive than the Judiciary."[15]

On the other hand, courts have, when faced with encroachments on personal liberty, extended certain constitutional protections to noncitizens inside the United States. "[O]nce an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."[16] In addition, "once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly."[17] Courts, when inquiring into due process considerations, "must consider the interest at stake for the individual, the risk of an erroneous deprivation through the procedures used as well as the probable value of different procedural safeguards, and the interest of the government in using the current procedures rather than additional or different procedures."[18] Thus, despite the fact that Congress and the executive branch have broad powers to administer the content of immigration law and policy, the judiciary regularly inquires whether due process — such as notice, the availability of counsel, an opportunity to present evidence and arguments to rebut the charges — has been satisfied.

A. Judicial Review Prior to 1996

For much of American history, Article III courts heard removal cases under their habeas corpus jurisdiction. Writs of habeas corpus have been available to those who were taken into custody, which is necessary for removal or deportation by the federal government.[19] As enacted in 1952, the Immigration & Nationality Act ("INA") did not contain a provision addressing judicial review. Noncitizens who were in custody continued to rely on habeas for review, but there was no clear path for appealing immigration orders before the noncitizen was placed in custody. This changed in 1955 when the Supreme Court held that the Administrative Procedure Act ("APA") in

13 *See* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 547 (1990). *See also, e.g.*, Ekiu v. United States, 142 U.S. 651, 651-60 (1892); Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 606-09 (1889).

14 *See* Adam B. Cox, *Citizenship, Standing, and Immigration Law*, 92 CAL. L. REV. 373, 382 (2004).

15 Mathews v. Diaz *et al.*, 426 U.S. 67, 81 (1976).

16 *See* Zadvydas v. Davis, 533 U.S. 678, 693 (2001) (striking down on due process grounds indefinite post-removal detention). *See also* Plyer v. Doe, 457 U.S. 202, 210 (1982) (striking down law prohibiting enrollment of noncitizens in public schools as a violation of the equal protection clause); *Diaz*, 426 U.S. at 77 (finding no due process violation in requiring lawful permanent resident status and five years continuous U.S. residence for noncitizens enrolling in federal medical insurance program).

17 Landon v. Plasencia, 459 U.S. 21, 32-33 (1982).

18 *Id.* at 34.

19 *See* THOMAS A. ALEINIKOFF, ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 1149-50 (6th ed. 2008); Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411, 1419-32 (1997). Suspension of habeas corpus, absent exigent circumstances, is prohibited by the Constitution. U.S. CONST. art. I, § 9, cl. 2.

combination with the INA authorized federal courts to review deportation orders.[20] In 1961, Congress amended the INA to include a provision specifically governing review of exclusion and deportation orders.[21] The 1961 amendment enshrined habeas corpus as the exclusive means for review of exclusion cases. Habeas petitions were filed in district court with appeal available in the courts of appeals. For deportation cases, Congress provided that the Hobbs Act — a statute that situates judicial review of decisions by government agencies directly in the courts of appeals, not the district courts — be the "sole and exclusive procedure" for the judicial review of all final orders of deportation.[22] Despite the absolute character of this "sole and exclusive" language, however, the amended INA also provided that "any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings."[23] In interpreting this dual system of review, courts limited habeas review of deportation to narrow circumstances to supplement review in the courts of appeals.[24] Review was available when a noncitizen had been placed "in custody" pursuant to an order of deportation.[25] Thus, the INA, as amended in 1961, provided two avenues for review: litigants could bring challenges directly in the courts of appeals or, if they were in custody, could file habeas petitions in the district courts.

The standard of review for a reviewing court, whether directly in the court of appeals or in the district court pursuant to a habeas petition, was specified by the INA, as amended in 1961. The court determined whether the finding of facts below was "supported by reasonable, substantial, and probative evidence on the record considered as a whole . . . ."[26] Under this "substantial evidence" standard, the decision was overturned only if the facts compelled a contrary conclusion.[27] Discretionary decisions were reviewed under an abuse-of-discretion standard[28] and legal conclusions were reviewed de novo.[29]

B. The 1996 Amendments to the INA: AEDPA and IIRIRA

This regime of judicial review continued until 1996, when it was dramatically altered by two separate statutes: AEDPA[30] and IIRIRA.[31] AEDPA and IIRIRA were occasioned by the political climate of the time, particularly with respect to the number of noncitizens coming into the country. At the time,

> [i]mmigration law became a prominent subject of political debate. Immigration policy was debated by candidates for the presidency, was the subject of state wide referenda, and was a frequent topic in both state and congressional elections. Many state governments began calling for the federal government to do "something" about illegal immigration. The media and political statements often referred to an "out of control" border. Others wanted to reduce the numbers of legal immigrants.[32]

---

20 Shaughnessy v. Pedreiro, 349 U.S. 48, 51-52 (1955). The Court reached the same conclusion regarding exclusion orders in Brownell v. We Shung, 352 U.S. 180, 184 (1956).

21 8 U.S.C. 1005a (repealed by § 306(a) of IIRIRA, Pub. L. No. 104-208, § 306(a), 110 Stat. 3009-546, 3009-612 (1996)). "Exclusion" or a "finding of inadmissibility" generally refers to denial of a noncitizen's attempt to seek admission or lawful entry into the United States. "Deportation," which is now called "removal," refers to the expulsion of a noncitizen who already is in the country.

22 28 U.S.C. §§ 2341-2351 (2006).

23 8 U.S.C. § 1105a(a)(10) (1994). This entire section was abrogated by IIRIRA, Pub. L. No. 104-208, § 306(b), 110 Stat. 3009-546, 3009-607 (1996). IIRIRA also consolidated the separate processes for review of deportation and exclusion orders into a single proceeding known as "removal." IIRIRA § 306(a)(2).

24 *See, e.g.*, Hiroshi Motomura, *Immigration Law and Federal Court Jurisdiction Through the Lens of Habeas Corpus*, 91 Cornell L. Rev. 459, 463 (2006); United States ex rel. Marcello v. INS, 634 F.2d 964, 967 (5th Cir. 1981) ("the mere existence of an outstanding deportation order against an alien" does not mean he was "held in custody'" and therefore, could not seek habeas corpus relief in district court).

25 *See U.S. ex rel. Marcello*, 634 F.2d at 966-72.

26 8 U.S.C. § 1105a(a)(4).

27 *See, e.g.*, Paredes-Urrestarazu v. INS, 36 F.3d 801, 807 (9th Cir. 1994); INS v. Elias-Zacarias, 502 U.S. 478, 481 n.1 (1992).

28 *See, e.g.*, Bazrafshan v. Pomeroy, 587 F. Supp. 498, 501 (D.N.J. 1984); Soroa-Gonzales v. Civiletti, 515 F. Supp. 1049, 1057 (N.D. Ga. 1981).

29 *Paredes-Urrestarazu,* 36 F.3d at 807.

30 Pub. L. No. 104-132, 110 Stat. 1214 (1996).

31 Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

32 Benson, *supra* note 19, at 1439-40.

AEDPA was inspired in part by the Oklahoma City bombing and congressional concern with dilatory and frivolous habeas petitions[33] that some members of Congress asserted clogged the courts and needlessly delayed deportations.[34] Both statutes reflected a concern that noncitizens were provided with too much access to federal courts. Judicial review, it was contended, should be restricted in order to hasten finality.[35]

Specifically, AEDPA precluded judicial review over most cases involving deportation of noncitizens convicted of certain criminal offenses.[36] IIRIRA had even further-reaching effects. The categories of "deportation" and "exclusion" were consolidated into a single "removal" process, and judicial review was only available under the same Hobbs Act procedure that controlled section 106 of the INA — that is, noncitizens could seek judicial review directly in the courts of appeals, not the district courts.[37] The treatment of removal orders, however, differs significantly from other administrative orders covered by the Hobbs Act because the INA, as amended in 1996, subjects removal orders to additional procedures and jurisdictional bars. For example, IIRIRA expressly precludes the court of appeals from remanding to the BIA for additional fact finding pursuant to § 2347(c) of the Hobbs Act.[38] The court of appeals is required to decide the petition for review only on the administrative record on which the order of removal is based.[39]

The Attorney General may use his or her discretion to grant various forms of relief from removal.[40] Pursuant to IIRIRA, the denial of such discretionary relief is largely not reviewable.[41] The now-unreviewable decisions included various waivers of requirements for admission to the United States, the opportunity for voluntary departure, cancellation of removal, certain adjustments to permanent resident status, and a catch-all provision for any other decisions covered by section 242(a)(2)(B) of the INA entrusted to the discretion of the Attorney General.[42] Given that executive actions deemed "discretionary" were not subject to judicial review under IIRIRA, the George W. Bush administration sought, with mixed results, to designate more aspects of immigration decisions as discretionary.[43]

Finally, under IIRIRA, the petitioner's time to file an appeal was in most circumstances reduced from 90 days to 30 days.[44]

Challenges to the 1996 amendments followed soon after their passage.[45] In 2001, the Supreme Court in *INS v. St. Cyr* addressed whether habeas corpus jurisdiction was available to review removal orders despite the jurisdiction-stripping provisions of AEDPA and IIRIRA.[46] There, the Court noted that two principles weighed heavily in favor of continued habeas jurisdiction: first, the "strong presumption in favor of judicial review of administrative action," and

---

33 *See* 141 CONG. REC. S7803 (daily ed. June 7, 1995) (statement of Sen. Specter) (speaking in the context of the Oklahoma City bombing and not immigration laws, Senator Specter noted that "[t]his bill is an appropriate place to take up habeas corpus reform, because the acts of terrorism in the atrocious bombing of the Federal building in Oklahoma City would carry with it the death penalty, and habeas corpus reform is very important in order to make the death penalty an effective deterrent.").

34 *See* 141 CONG. REC. S7807 (daily ed. June 7, 2005) (statement of Sen. Hatch).

35 *See* S. REP. NO. 104-249, at 7 (1996) ("Aliens who violate U.S. immigration law should be removed from this country as soon as possible. Exceptions should be provided only in extraordinary cases specified in the statute and approved by the Attorney General. Aliens who are required by law or the judgment of our courts to leave the United States are not thereby subjected to a penalty. The opportunity that U.S. immigration law extends to aliens to enter and remain in this county [*sic*] is a privilege, not an entitlement.").

36 AEDPA § 440(a) (repealed and replaced by IIRIRA § 306(a), now codified at 8 U.S.C. § 1252(a)(2)(C) (2006)).

37 IIRIRA § 306(a) (amending INA § 242(a)(1)).

38 IIRIRA § 306(a)(2) (amending 8 U.S.C. § 1252(a)(1)).

39 IIRIRA § 306(a)(2) (amending 8 U.S.C. § 1252(b)(4)(A)).

40 8 U.S.C. § 1182(h)-(i).

41 IIRIRA§ 309(c)(4)(C) (amending INA § 242(a)(2)(B)).

42 IIRIRA § 306(a) (amending INA § 242(a)(2)(B)). *See also* Heckler v. Chaney, 470 U.S. 821, 828 (1985) (under the APA, actions "committed to agency discretion by law" were not reviewable in court).

43 *See, e.g.*, Board of Immigration Appeals: Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents, 73 Fed. Reg. 34,654, 34,654, 34,657 (June 18, 2008) (proposed rules stating that the BIA's decision to streamline is discretionary and thus not subject to judicial review).

44 IIRIRA § 306(a) (amending INA § 242(b)(1)).

45 *See, e.g.*, Reno v. American-Arab Anti-Discrimination Committee, 525 U.S. 471, 476-92 (1999) (IIRIRA deprived courts of jurisdiction to hear challenges to selective deportation); Calcano-Martinez v. INS, 533 U.S. 348, 351-52 (2001) (court of appeals lacked jurisdiction to review removal order of noncitizen convicted of aggravated felony, but noncitizen could still bring habeas challenge).

46 *St. Cyr*, 533 U.S. at 298.

second, the "longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction."[47] Moreover, "[a] construction of the amendments at issue that would entirely preclude review of a pure question of law by any court would give rise to substantial constitutional questions."[48] These questions — rooted in the Suspension Clause of the Constitution — necessitated the availability of judicial review.[49]

The Court rejected the Attorney General's contention that the common law habeas review protected by the Suspension Clause was not broad enough to encompass claims such as that of St. Cyr because historic habeas was not available for the review of discretionary determinations. Since St. Cyr was unquestionably deportable and his claim only concerned discretionary relief — i.e., whether a waiver from deportation was available — the Attorney General contended that it could not be reviewed on a habeas petition. The Court rejected this contention, noting that St. Cyr raised a pure question of law, and that habeas historically has been used to review legal (as opposed to factual) determinations related to discretionary relief in immigration cases.[50]

The Court further concluded that neither AEDPA nor IIRIRA evidenced such a clear repeal of habeas jurisdiction despite directing all appeals pursuant to the Hobbs Act. The opinion noted that the statutes repealed judicial review, but that in the immigration context, judicial review did not include collateral habeas review.[51] None of the other provisions revoked habeas jurisdiction either, and the ability of noncitizens to bring habeas challenges to their deportation orders was deemed to survive the 1996 amendments. The Court indicated, however, that "Congress could, without raising constitutional questions, provide for an adequate substitute through the courts of appeals including review of questions of law."[52]

C. The REAL ID Act of 2005

The REAL ID Act of 2005[53] ("REAL ID Act") was the next piece of legislation to affect the scope of judicial review of immigration decisions, and its provisions and history make clear that it was a direct response to *St. Cyr*.[54] First, the REAL ID Act purported to eliminate all habeas corpus review of final orders of removal, providing that "the court of appeals shall be the sole and exclusive means for judicial review of an order of removal."[55] Second, in a nod to *St. Cyr*'s concerns about complete elimination of review,[56] the REAL ID Act restored judicial review "notwithstanding any other provisions" for "constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals . . . ."[57] The intention was to "effectively limit all aliens to one bite of the apple with regard to challenging an order of removal, in an effort to streamline what the Congress saw as uncertain and piecemeal review of orders of removal, divided between the district courts (habeas corpus) and the courts of appeals (petitions for review)."[58]

Since the passage of the REAL ID Act in 2005, there has been no other legislation which has changed the scope of judicial review of removal decisions. Currently, courts of appeals have jurisdiction to review

47 *Id.* at 298.

48 *Id.* at 300.

49 Article I, Section 9 of the Constitution states "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. 1, §9.

50 The question of law was whether IIRIRA and AEDPA applied retroactively; that is, to a noncitizen who pled guilty to a deportable criminal offense before their enactment.

51 *St. Cyr*, 533 U.S. at 311.

52 *Id.* at 314 n. 38.

53 Pub. L. No. 109-13, 119 Stat. 231 (2005).

54 H.R. REP. No. 109-72, at 173-74 (2005) ("[certain provisions in the bill] would address the anomalies created by *St. Cyr* and its progeny by restoring uniformity and order to the law"); *see also* Motomura, *supra* note 13, at 488; Gerald L. Neuman, *On the Adequacy of Direct Review After the REAL ID Act of 2005*, 51 N.Y.L. SCH. L. REV. 133, 134 (2006).

55 REAL ID Act § 106(a)(1)(B) (amending INA § 242(a)(5)).

56 *See* H.R. REP. No. 109-72, at 175 (2005) (noting that the REAL ID Act was considered by the drafters of the conference report to comply with constitutional requirements as articulated in *St. Cyr*); *see also* David M. McConnell, *Judicial Review Under the Immigration and Nationality Act: Habeas Corpus and the Coming of REAL ID (1996-2005)*, 51 N.Y.L. SCH. L. REV. 75, 106-107 (2006).

57 REAL ID Act § 106(a)(1)(A)(iii) (amending INA § 242(a)(2)(D)).

58 Bonhometre v. Gonzales, 414 F.3d 442, 445 (3d Cir. 2005) (citing H.R. REP. NO. 109-72, at 173-75 (2005) (Conf. Rep.)).

all constitutional issues and questions of law related to a final order of removal. Habeas corpus review of final orders of removal in the district courts (except in the case of expedited removal) is no longer available.

III. Issues Relating to Judicial Review by Circuit Courts

A. The Elimination of Judicial Review of Discretionary Decisions Is Overbroad

Our review of post-1996 case law and interviews with immigration scholars, practitioners, and judges at all levels indicate that the layering of rules, exceptions, and jurisdictional deadlines have significantly increased the complexity of immigration law. Judge Bea of the U.S. Court of Appeals for the Ninth Circuit observed that "immigration law has developed somewhat like our federal tax laws: new legislation has been adopted many times over the years and added to the previous law."[59] While some differences among the courts of appeals in interpreting this complex body of law are to be expected, many experts and judges have noted myriad issues, especially relating to jurisdiction, on which the circuit courts are split.[60] Moreover, some commentators have suggested that, rather than dealing with the merits of a challenge to removal, the courts of appeals now spend an inordinate amount of time determining the scope of their own jurisdiction.[61]

This complexity is demonstrated by the 1996 amendments to the INA that preclude judicial review of a wide variety of decisions that are within the discretion of the Attorney General or the Secretary of the Department of Homeland Security ("DHS").[62] The discretionary decisions over which jurisdiction has been expressly divested include waivers of inadmissibility for certain crimes under certain conditions,[63] cancellation of removal,[64] voluntary departure,[65] and status adjustments.[66] In addition, the statute was amended to exclude from judicial review any other discretionary decisions except the grant of asylum.[67] The restrictions on review do not preclude review of legal or constitutional error in the denial of discretionary relief.[68]

During the George W. Bush administration, the executive and legislative branches sought to insulate more and more decisions by the Attorney General as "discretionary" and therefore exempt from judicial review. For example, during an attempt at comprehensive reform of the immigration system in 2006, a Senate bill proposed to amend the INA to state expressly that motions to reopen and motions to reconsider removal orders were committed to the

---

59 *Litigation Reduction Hearing, supra* note 8, at 48 (written statement of Judge Carlos T. Bea, Circuit Judge, Ninth Circuit Court of Appeals).

60 Examples of jurisdictional issues on which the circuit courts are split include: i) whether the determination that a noncitizen has been convicted of a "particularly serious" crime is a matter of "discretion" within the meaning of § 1252(a)(2)(B), *compare, e.g.*, Villegas v. Mukasey, 523 F.3d 984, 987 (9th Cir. 2008) (holding that whether a crime is "particularly serious" is a "determination [ ] committed by statute to the Attorney General's discretion, so this court lacks jurisdiction to review it") *with* Nethagani v. Mukasey, 532 F.3d 150, 154-55 (2d Cir. 2008) (reaching the contrary conclusion); ii) whether the determination of "extreme cruelty" is discretionary, *compare, e.g.*, Wilmore v. Gonzales, 455 F.3d 524, 528 (5th Cir. 2006) (determination is discretionary and therefore no jurisdiction); Perales-Cumpean v. Gonzales, 429 F.3d 977, 984 (10th Cir. 2005) (same), *with* Hernandez v. Ashcroft, 345 F.3d 824, 833-35 (9th Cir. 2003) (not discretionary and therefore court has jurisdiction); iii) whether discretion conferred by regulation rather than statute is subject to judicial review, *compare, e.g.*, Onyinkwa v. Ashcroft, 376 F.3d 797, 799 (8th Cir. 2004) (holding that decisions marked as discretionary by regulation are unreviewable under the § 1252(a)(2)(B)(ii) bar), *with* Medina-Morales v. Ashcroft, 371 F.3d 520, 528-29 (9th Cir. 2004) (§ 1252(a)(2)(B)(ii) only bars review of actions the statute itself specifies as discretionary). *See also* Neuman, *supra* note 54, at 138 n.23 (noting that the REAL ID Act did not address the circuit split on whether the INA also limits review of discretion granted by regulations). After the completion of this Report, the Supreme Court issued Kucana v. Holder (558 U.S._, 130 S.Ct. 827 (2010), which held that determinations declared discretionary by regulation are reviewable.

61 *See, e.g.*, Lenni B. Benson, *Making Paper Dolls: How Restrictions on Judicial Review and the Administrative Process Increase Immigration Cases in the Federal Courts*, 51 N.Y.L. SCH. L. REV. 37, 41-43 (2006).

62 8 U.S.C. § 1252(a)(2)(B).

63 8 U.S.C. § 1182(h)-(i).

64 8 U.S.C. § 1229b.

65 8 U.S.C. § 1229c.

66 8 U.S.C. § 1255.

67 8 U.S.C. § 1252(a)(2)(B)(ii).

68 8 U.S.C. § 1252(a)(2)(D).

discretion of the Attorney General.[69] In 2008, the Executive Office for Immigration Review ("EOIR") proposed rules intended to resolve a split in the courts of appeals over whether the BIA's decision to streamline a case and issue an Affirmance Without Opinion ("AWO") was discretionary and thus not reviewable.[70] The proposed rules purported to clarify "that the criteria the [BIA] uses in deciding to invoke its AWO authority are solely for its own internal guidance, and that the [BIA's] decision depends on the Board's judgment regarding its resources and is not reviewable."[71] Despite the attempted expansion of discretionary decisions, none of the relevant statutes define what is meant by "discretion" or "discretionary decisions." The exercise of discretion can encompass different types of conduct or decision making. To take one prominent example, the APA — the default statute for judicial review of administrative action — notes that "agency action . . . committed to agency discretion by law" is unreviewable,[72] but that other discretionary decisions should be held unlawful and set aside when they amount to "an abuse of discretion."[73] Two very different concepts of discretion are illustrated by the APA: in the first, discretion is used to signify congressional intent to restrain judicial review over administrative action; in the second, the exercise of subjective administrative judgment might allow for considerable leeway, but it still may not be exercised arbitrarily. In general, most discretionary actions reviewed under the APA fall into the latter category.[74] In addition, there are analytical differences in the form of discretion exercised by adjudicative bodies. By function and importance, a discretionary decision to grant ultimate relief to a noncitizen is conceptually different from the discretionary decision to reopen a specific case in light of new evidence.

Given the imprecision in the word "discretion" and the potential for the Executive branch to expansively interpret it, the line between questions of *discretion*, which cannot be judicially reviewed under the current INA,[75] and questions of *law*, which plainly can, is not clear enough to support a jurisdictional bar.[76] Put another way, the difference between a legal question in interpreting a statute or regulation and a discretionary question in applying the statute or regulation is an insufficient and unclear basis on which to determine whether any judicial review is available. This point is illustrated by the *St. Cyr* case.

In *St. Cyr*, the Supreme Court was faced with a petitioner seeking a discretionary waiver of deportation from the Attorney General.[77] In addressing the scope of habeas jurisdiction, the Court noted that questions of discretion and law are often intertwined in the immigration context, and that habeas jurisdiction has traditionally extended to those questions.[78] Even further, "courts recognized a distinction between

---

69 Securing America's Borders Act, S. 2454, 109th Cong. § 508(a) (2d Sess. 2006). Certain circuits have held that denials of motions to reopen or reconsider are reviewable under an abuse of discretion standard. *See, e.g.*, Shierly v. Attorney Gen., No. 07-4231, 2009 WL 190056, at *1 (3d Cir. Jan. 28, 2009); Singh v. Mukasey, 536 F.3d 149, 153 (2d Cir. 2008); Al Roumy v. Mukasey, 290 Fed. Appx. 856, 858 (6th Cir. 2008). As noted in note 60, *supra*, the Supreme Court held in *Kucana* that decisions declared as discretionary by regulation (rather than by statute) are reviewable by the courts of appeals.

70 *Compare, e.g.*, Ngure v. Ashcroft, 367 F.3d 975, 981-88 (8th Cir. 2004) (The BIA's decision to streamline a case is not subject to judicial review), *with* Smriko v. Ashcroft, 387 F.3d 279, 290-94 (3d Cir. 2004) (exercising jurisdiction over the decision to streamline).

71 Board of Immigration Appeals: Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents, 73 Fed. Reg. 34,654, 34,657 (June 18, 2008). *See* Part 3, Section II.B.4, *supra*, for discussion of the 2008 proposed streamlining reforms.

72 5 U.S.C. § 701(a)(2). "Even where Congress has not affirmatively precluded review, review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." Heckler v. Chaney, 470 U.S. 821 (1985) (discretionary decision by Food and Drug Administration not to take enforcement action to prevent drugs from being used by prisoners convicted of capital crimes not subject to review under the APA); Conyers v. Rossides, 558 F.3d 137 (2d Cir. 2009) (Administrator's discretionary decision whether to use personnel management system to appoint security screeners not subject to judicial review under the APA); Greer v. Chao, 492 F.3d 962 (8th Cir. 2007) (manner of investigating veteran's discrimination claim not subject to judicial review under the APA).

73 5 U.S.C. § 706(2)(a).

74 The APA contains a "strong presumption that Congress intends judicial review of administrative action." Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667, 670 (1986). *See also St. Cyr*, 533 US at 298; McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 498-99 (1991); Webster v. Doe, 486 U.S. 592, 603 (1988).

75 8 U.S.C. § 1252(a)(2)(B)(ii).

76 8 U.S.C. § 1252(a)(2)(D).

77 *St. Cyr*, 533 U.S. at 293.

78 *Id*. at 307.

eligibility for discretionary relief, on the one hand, and the favorable exercise of discretion, on the other hand. . . . Eligibility that was governed by specific statutory standards provided a right to a ruling on an applicant's eligibility, even though the actual granting of relief was not a matter of right under any circumstances, but rather is in all cases a matter of grace."[79] Despite the fact that the decision to grant or deny a waiver was discretionary, the decision itself was both mandatory and subject to review. Distinctions of this character are hardly limited to *St. Cyr*.[80]

The complex system of "discretionary" carve-outs to judicial review and exceptions to those carve-outs based on constitutional or legal questions have muddled the jurisdictional landscape considerably. Not only do courts expend resources in making this determination, they reach differing conclusions as the Executive branch presses to insulate more and more actions under the rubric of discretion. The circuits are divided over whether an agency — as opposed to clear statutory language — can label certain decisions as discretionary and thus immune from review. Some courts have relied on the "catch-all" provision of IIRIRA to hold that regulations designating certain decisions as discretionary are sufficient to make the decisions unreviewable.[81] Other courts have held that certain decisions labeled "as discretionary based on authority found in an implementing *regulation* would contradict the plain statutory language of § 1252(a)(2)(B)(ii), which specifies that courts are only stripped of authority to review decisions designated as discretionary by the *statute*."[82]

None of this is to say that the distinction between law and discretion is not a useful or necessary one. The implementation and execution of the immigration laws would be unthinkable without some discretion in the hands of executive agencies. But it does not follow that acknowledging that discretion must be exercised requires that such exercise be unfettered and unreviewable. The stakes in immigration cases are often high. Immigration courts determine whether a noncitizen will be forced to leave the United States, whether a family will be broken up, whether someone will be returned to a country suffering from violence, political instability, and economic disaster.[83] Such decisions have an enormous impact on millions of families residing in the United States and should not be undertaken arbitrarily, yet they are largely unreviewable by a federal court under current law.[84]

As a general matter, courts strongly presume that agency action is reviewable.[85] Even under the APA, provisions that insulate decisions from judicial review are to be narrowly construed.[86] Before the 1996 amendments, discretionary decisions were reviewed under an abuse-of-discretion standard.[87] This standard reflects a more appropriate balance between agency

---

79 *Id*. at 307-08 (internal quotations omitted).

80 *See, e.g.*, Ortiz-Cornejo v. Gonzales, 400 F.3d 610, 612 (8th Cir. 2005) (denial of a petition for cancellation of removal is discretionary and thus unreviewable, but nondiscretionary determinations such as continuous physical presence can be reviewed); Singh v. Gonzales, 413 F.3d 156, 160 n.4 (1st Cir. 2005) (court lacks jurisdiction over discretionary denials of applications for adjustment of status, but can review the legal question of whether the applicant meets the statutory threshold of admissibility); Okeke v. Gonzales, 407 F.3d 585, 588 n.4 (3d Cir. 2005) (allowing jurisdiction over interpretive question of denial of cancellation of removal).

81 Yerkovich v. Ashcroft, 381 F.3d 990, 993 (10th Cir. 2004) ("Although the statutes themselves do not specifically confer discretion on the Attorney General to grant or deny a continuance, the regulations clearly confer such discretion on the IJ."); *see also Onyinkwa*, 376 F.3d at 799 ("Since a regulation implementing subchapter II specifies that the power to grant continuances is within the discretion of immigration judges, under IIRIRA courts generally have no jurisdiction to review the exercise of that discretion.").

82 Ayanbadejo v. Chertoff, 517 F.3d 273, 278 (5th Cir. 2008) (emphases in original); *see also* Sanusi v. Gonzales, 445 F.3d 193, 199 (2d Cir. 2006) (despite regulations authorizing decision, "we cannot conclude that the decision to grant or to deny a continuance in immigration proceedings is 'specified under [the relevant] subchapter to be in the discretion of the Attorney General.' Indeed, continuances are not even mentioned in the subchapter."); *Medina-Morales*, 371 F.3d at 528 ("Interpreting [§ 1252(a)(2)(B)(ii)], we have emphasized that it 'refers not to "discretionary decisions," . . . but to acts the *authority* for which is *specified* under the INA to be discretionary.' Thus the jurisdictional bar in § 1252(a)(2)(B)(ii) applies only to acts over which a statute gives the Attorney General pure discretion unguided by legal standards or statutory guidelines.") (internal citations omitted) (emphasis in original). *See also* note 60, *Supra*, regarding *Kucana*.

83 The Attorney General has the discretion to cancel removal of a noncitizen based on certain criteria, including whether "removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." 8 U.S.C. § 1229b(b)(1)(D).

84 8 U.S.C. § 1252(a)(2)(B)(ii). *See also* Barco-Sandoval v. Gonzales, 516 F.3d 35, 36 (2d Cir. 2008); Memije v. Gonzales, 481 F.3d 1163, 1164 (9th Cir. 2007).

85 *See* Ruiz v. Mukasey, 552 F.3d 269, 273 (2d Cir. 2009); *see also St. Cyr*, 533 U.S. at 298.

86 *See* Conyers v. Rossides, 558 F.3d 137, 143 (2d Cir. 2009); Colo. Envtl. Coal. v. Wenker, 353 F.3d 1221, 1228 (10th Cir. 2004).

87 *See, e.g.*, Pablo v. INS, 72 F.3d 110, 113 (9th Cir. 1995); Guillen-Garcia v. INS, 60 F.3d 340, 344 (7th Cir. 1995).

flexibility and judicial oversight, and is more suited to an area of law with such wide-ranging consequences for the liberty of those with limited access to the democratic process.

B. By Stripping Habeas Corpus Jurisdiction and Restricting Remand, Congress Has Virtually Eliminated Courts' Ability to Order Fact Finding

As noted above, prior to IIRIRA, a noncitizen challenging an order of removal in federal court could choose between two avenues of review. She could file directly in a court of appeals, or if she was "in custody," she could file a habeas petition in district court.[88] Both of these options preserved the petitioner's ability, in certain circumstances, to have new evidence presented before the Article III court. Neither of these options for presenting new evidence exists today.

1. Habeas Jurisdiction and Circuit Court Review through 1996 and in 2005

Between 1961 and 1996, a noncitizen "in custody" pursuant to an order of removal had the ability to file a habeas petition in the district court. The INA as amended in 1961 specified that the challenges to a deportation order that could be reviewed by a district court sitting in habeas were limited to:

☐ (A) whether the alien is in fact the alien described in the order;

☐ (B) whether the alien is in fact an alien described in [the INA];

☐ (C) whether the alien has been convicted of an aggravated felony and such conviction has become final; and

☐ (D) whether the alien was afforded the procedures required by [the INA].[89]

In addition to these specific, albeit limited, bases for habeas jurisdiction conferred by the INA, district courts relied on the general statutory grant of habeas jurisdiction available to persons held in custody by the United States.[90] This availability of habeas review existed alongside the availability of circuit court review of removal orders.

The standard of review for a court sitting in habeas was the same as the standard applied by the courts of appeals in reviewing deportation orders. The court determined whether the deportation order was "supported by reasonable, substantial, and probative evidence on the record considered as a whole . . . ."[91] Under this "substantial evidence" standard, the decision was overturned only if the facts compelled a contrary conclusion.[92] Discretionary decisions were reviewed under an abuse-of-discretion standard,[93] and legal conclusions were reviewed de novo.[94]

With respect to the taking of additional facts, the then-controlling section of the INA specified that when a noncitizen sought review directly in the court of

---

88 Courts have waived the requirement that the petitioner exhaust administrative remedies and permitted the district court to exercise general federal question jurisdiction under 28 U.S.C. § 1331 where an adequate factual record cannot be developed in immigration court. *See, e.g.*, McNary v. Haitian Refugee Center, Inc., 498 U.S. 479, 481 (citing amicus filed by the American Bar Association) ("[S]tatutes that provide for only a single level of review in the courts of appeals are traditionally viewed as warranted only in circumstances where district court fact finding would unnecessarily duplicate an adequate administrative record — circumstances that are not present in 'pattern and practice' cases where district court fact finding is essential. It therefore seems plain to us . . . that restricting judicial review to the court of appeals [in pattern and practice challenges] is the practical equivalent of a denial of judicial review of generic statutory and constitutional claims."); Aquilar v. ICE, 510 F.3d 1, 17 (1st Cir. 2007) (district courts have jurisdiction over claims that pattern and practice of government conduct was unlawful if requiring exhaustion would deny meaningful review).

89 8 U.S.C. § 1105a(d)(1) (1994). Section 1252a(b)(4) provided that the alien be "given reasonable notice of the charges and of the opportunity" to review the evidence and challenge the charges, that the alien "have the privilege of being represented (at no expense to the government)," that the alien have "a reasonable opportunity to inspect the evidence and rebut the charges," that the record be "maintained for judicial review," and that "the final order of deportation is not adjudicated by the same person who issues the charges." 8 U.S.C. § 1252a(b)(4) (1994).

90 28 U.S.C. § 2241(c)(1) (1994) ("[t]he writ of habeas corpus shall not extend to a prisoner unless . . . [h]e is in custody under or by color of the authority of the United States").

91 8 U.S.C. § 1105a(a)(4)(1994). *See also U.S. ex rel. Marcello*, 634 F.2d at 972.

92 *See, e.g.*, *Paredes-Urrestarazu*, 36 F.3d at 807; INS v. Elias-Zacarias, 502 U.S. 478, 480 n.1 (1992); *see also* Chen Zhou Chai v. Carroll, 48 F.3d 1331, 1338 (4th Cir. 1995).

93 *See, e.g.*, *Bazrafshan*, 587 F. Supp. at 501; *Soroa-Gonzales*, 515 F. Supp. at 1057.

94 *See, e.g.*, *Paredes-Urrestarazu*, 36 F.3d at 807.

appeals, "the petition shall be determined solely upon the administrative record upon which the deportation order is based" and that the Attorney General's findings of fact "shall be conclusive."[95] Courts, however, were not unnecessarily shackled by the record. "A court of appeals . . . reviews the administrative record only and will not conduct a de novo hearing on matters which could have been considered in the administrative proceedings, but were not. Where, however, alleged unfairness is extrinsic to the record, a court of appeals may remand the case to the agency for further inquiry and findings."[96]

The ability of the courts of appeals to remand for additional fact finding in cases challenging agency orders is covered by the Hobbs Act:

> If a party to a proceeding to review applies to the court of appeals in which the proceeding is pending for leave to adduce additional evidence and shows to the satisfaction of the court that —
>
> (1) the additional evidence is material; and
>
> (2) there were reasonable grounds for failure to adduce the evidence before the agency;
>
> the court may order the additional evidence and any counterevidence the opposite party desires to offer to be taken by the agency. The agency may modify its findings of fact, or make new findings, by reason of the additional evidence so taken, and may modify or set aside its order, and shall file in the court the additional evidence, the modified findings or new findings, and the modified order or the order setting aside the original order.[97]

Thus, a court of appeals could order the agency to find facts when new evidence was material to the adjudication of the case[98] and there were reasonable grounds for not having brought forth the evidence at the administrative level.[99]

Prior to IIRIRA, courts held that remand under § 2347(c) was not precluded by 8 U.S.C. § 1105a, which requires that the court base its decision solely on the administrative record.[100] However, IIRIRA expressly stated that the court of appeals may not remand for the taking of additional facts under § 2347(c) of the Hobbs Act.[101]

Unlike the review available in the courts of appeals, which could only remand for fact finding, the habeas statute empowered a district court sitting in habeas to "hear and determine the facts, and dispose of the matter as law and justice require."[102] As such, district courts had the ability to decide the matter on the administrative record, but could also hold evidentiary hearings and order discovery to supplement the record or, when necessary, remand

---

95 8 U.S.C. § 1105a(a)(4).

96 Garcia v. Boldin, 691 F.2d 1172, 1182 (5th Cir. 1982).

97 28 U.S.C. § 2347(c) (1994).

98 To be material, the evidence must be relevant and not cumulative. *See, e.g.*, Bernal-Garcia v. INS, 852 F.2d 144, 147 (5th Cir. 1998) (letter from petitioner's brother detailing physical threats made by Salvadorian soldiers against petitioner was "probative on the issue of likelihood of Bernal being subject to persecution in the event of deportation"); Feleke v. INS, 118 F.3d 594, 599 (8th Cir. 1997) (remand for information regarding abuses by the Ethiopian government toward organization of which petitioner was a member was material); Refahiyat v. INS, 29 F.3d 553 (10th Cir. 1994) (remand denied where evidence of petitioner's conversion to Mormonism as ground for fear of persecution by the Iranian government had been considered by the BIA); Fleurinor v. INS, 585 F.2d 129, 133 (5th Cir. 1978) (Amnesty International report found material in another case "does not establish the universal materiality of this report. In order for evidence to be 'material' within the meaning of § 2347(c), the evidence must be probative on the issue of the likelihood of *this alien* being subject to persecution in the event of deportation") (emphasis added).

99 The petitioner must provide "reasonable grounds" for not producing the evidence during the administrative proceeding. *See, e.g.*, Mackonnen v. INS, 44 F.3d 1378, 1386 (8th Cir. 1995) (remand ordered where the letter describing incarceration was not available until after conclusion of administrative process); Osaghae v. INS, 942 F.2d 1160 (7th Cir. 1991) (remand ordered where petitioner had sought additional information but delivery of documents was delayed because INS moved petitioner to different jails); Dolores v. INS, 772 F.2d 223, 227 (6th Cir. 1985) ("Even if the Amnesty International report were material, Dolores' failure to articulate reasonable grounds for not earlier bringing the information it contains to the attention of the BIA raises an inference of dilatory tactics"); Coriolan v. INS, 559 F.2d 993 (5th Cir. 1977) (remand ordered where Amnesty International report had not been available for public use during prior administrative hearings).

100 *See, e.g., Mackonnen*, 44 F.3d at 1385; *Coriolan*, 559 F.2d at 1003.

101 IIRIRA § 306(a)(2) (amending 8 U.S.C. § 1252(a)(1) to subject judicial review of removal orders to the Hobbs Act "except that the court may not order the taking of additional evidence under section 2347(c) of such title").

102 28 U.S.C. § 2243 (1994).

the case back to the BIA for further fact finding.[103]

The 1996 amendments repealed the section of the INA that allowed for habeas review and provided that judicial review of removal orders was exclusively by the courts of appeals. The availability of habeas after IIRIRA was uncertain until *INS v. St. Cyr*, in which the Attorney General argued that AEDPA and IIRIRA eliminated all habeas jurisdiction over immigration decisions.[104] The Supreme Court disagreed, holding that "[a] construction of the amendments at issue that would entirely preclude review of a pure question of law by any court would give rise to substantial constitutional questions."[105] While the 1996 amendments as interpreted by the Attorney General raised troubling constitutional questions over suspension of habeas, the Court "note[d] that Congress could, without raising any constitutional questions, provide an adequate substitute [for habeas] through the courts of appeals."[106]

The REAL ID Act took the Court up on its suggestion. In 2005, Congress expressly stripped courts of habeas jurisdiction over removal orders.[107] To avoid the constitutional concerns identified by the Supreme Court, the INA was amended to provide that none of the changes that "limit[] or eliminate[] judicial review . . . shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section."[108] Congress addressed the ambiguity over whether the legislation strips habeas jurisdiction by making these statements much clearer, and in response to the Suspension Clause concerns, ensured that constitutional issues and questions of law are available for direct review in the courts of appeals — in short, an "adequate substitute" for the habeas review that previously existed.[109] Under this substitute, however, Article III courts appear to be left without the ability to hear new evidence or to remand to the agency for the taking of new evidence in appropriate cases where doing so would address the constitutional claim presented.

2. Court of Appeals Review is Inadequate Where Additional Fact Finding is Necessary

The habeas substitute in the courts of appeals does not account for the taking of additional facts. Where petitioners in some circuits since IIRIRA have attempted to adduce additional facts to be considered by the court of appeals, they have been unsuccessful due to the restriction added to § 1252(a)(1) by IIRIRA. The Fourth Circuit case *Lendo v. Gonzales* serves as just one example.[110] There, an unlawfully present noncitizen filed a motion for a continuance in his removal proceeding. The motion was partly based upon his wife's filing of a labor certification application, which — if approved — could have allowed him to apply for an adjustment of status.[111] The IJ denied the motion for a continuance and the BIA affirmed the denial. The court of appeals affirmed because it found that the IJ's ruling was not an abuse of discretion. It noted, however, that the outcome would have been different if it could have remanded for fact finding. The court pointed out that "[t]he parties have informed us that (1) after the IJ issued her ruling, Lendo's wife's labor certification was approved, and (2) after the Board affirmed the IJ's decision, Lendo's wife was granted a visa and received an adjustment of status. In the interests of justice, we would be inclined to remand Lendo's case for

---

103 *See, e.g.*, Kasipillai v. Schiltgen, C-95-0383 CW, 1995 WL 338014, at *4-5 (N.D. Cal. May 23, 1995); Makarian v. Turnage, 624 F.Supp. 181 (S.D. Cal. 1985); Sarkis v. Nelson, 585 F. Supp. 235 (E.D.N.Y. 1984).

104 *St. Cyr*, 533 U.S. at 298.

105 *Id.* at 300. The constitutional question was whether AEDPA and IIRIRA amendments violated the Suspension Clause of the Constitution, which states that "[t]he privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST., art I, § 9, cl. 2.

106 *St. Cyr*, 533 U.S. at 314 n.38.

107 *See* 8 U.S.C. § 1252(a)(2). Courts have held that habeas corpus is still available to noncitizens challenging an aspect of detention separate from a challenge to the removal order. *See, e.g.*, Flores-Torres v. Mukasey, 548 F.3d 708, 711 (9th Cir. 2008).

108 8 U.S.C. § 1252(a)(2)(D).

109 *See* H.R. REP. NO. 109-72, at 175 (2005) ("By placing all review in the courts of appeals, [the Act] would provide an 'adequate and effective' alternative to habeas corpus.").

110 493 F.3d 439 (4th Cir. 2007). *See also* Najjar v. Ashcroft, 257 F.3d 1262, 1282 (11th Cir. 2001) (interpreting "IIRIRA § 309(c)(4)(B) as eliminating our authority under § 2347(c) to remand to the BIA so that an alien can present 'additional evidence'").

111 *Id.* at 440; *see also* 8 U.S.C. § 1255(i). The noncitizen's status could be adjusted if a few other criteria were met.

consideration of these intervening developments; *but we are barred by statute from doing so*."[112]

Furthermore, in *Gebremaria v. Ashcroft*, a noncitizen moved to reopen her application for asylum, which was based in part on the fact that her husband had been imprisoned and then disappeared in her home country of Ethiopia.[113] In denying her motion, the BIA mentioned that there was insufficient evidence as to her husband's imprisonment and disappearance.[114] By the time the case reached the court of appeals, however, she had obtained an affidavit attesting that her husband had escaped from prison and was in hiding, but the court found that it was statutorily barred from remanding the case for further fact finding.[115] Similarly, in *Lin v. Mukasey*, the court ruled that it lacked the authority to remand a case for further fact finding when a noncitizen sought to present further evidence as to persecution he might face if removed to his home country.[116] Numerous other cases note the court of appeals' inability to order fact finding or consider undisputed facts outside the record.[117]

The unavailability of fact finding and the forcing of decisions with a blind eye to relevant facts also prejudices the petitioner who raises an asylum claim or a claim under the Convention Against Torture ("CAT"), to which the United States is a signatory.[118] Under CAT, a noncitizen who can demonstrate "that it is more likely than not that he or she would be tortured if removed to the proposed country of removal" can have removal withheld.[119] Asylum and CAT claims, however, are subject to the same restriction on remand for further fact finding as other claims, and this can pose problems when country conditions change quickly. Courts of appeals, thus, have often declined to entertain evidence of changed country conditions offered to support a variety of claims. In *Jasem v. U.S. Attorney General*, for example, the petitioner attempted to introduce evidence "which he contend[ed] shows 'gross, flagrant and mass violations of human rights in Iraq,'" but was prevented from doing so.[120] Judge Becker of the Third Circuit described the problem eloquently:

> It has become common that those country reports in the administrative record are three or four years old by the time the petition for review comes before us, and they frequently do not fairly reflect what our knowledge of world events suggests is the true state of affairs in the proposed country of removal, or the region embracing it. It almost goes without saying that, in the troubled areas of the planet from which asylum claims tend to come, the pace of change is rapid — oppressive regimes rise and fall, and conditions improve and worsen for vulnerable ethnic, religious, and political minorities. As a consequence, we become like astronomers whose telescopes capture light rays that have taken millions of years to traverse the cosmos, revealing things as they once were, but are no longer. But unlike astronomers, who can only speculate about what is happening at this moment in a far-off galaxy, we often know very well what has happened in the years since an administrative record was compiled.[121]

---

112 493 F.3d at 443 n.3 (emphasis added).

113 378 F.3d 734 (8th Cir. 2004).

114 *Id.* at 736.

115 *Id.* at 737.

116 303 Fed. Appx. 465, 468 (9th Cir. 2008).

117 *See, e.g.*, Ezeagwu v. Mukasey, 537 F.3d 836, 840 (8th Cir. 2008) (declining to remand for the taking of new evidence); Liu v. U.S. Att'y Gen., 242 Fed. Appx. 665, 667 (11th Cir. 2007) (same); Hasnain v. Keisler, 248 Fed. Appx. 612, 612 (5th Cir. 2007) (same); Pickering v. Gonzales, 465 F.3d 263, 270-71 (6th Cir. 2006) (same).

118 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 113. *See also* Jill M. Pfenning, *Inadequate and Ineffective: Congress Suspends the Writ of Habeas Corpus for Noncitizens Challenging Removal Order by Failing to Provide a Way to Introduce New Evidence*, 32 Vt. L. Rev. 735, 760-69 (2007).

119 8 C.F.R. § 1208.16(c)(2)-(4) (2009).

120 157 Fed. Appx. 153, 159 (11th Cir. 2005).

121 Berishaj v. Ashcroft, 378 F.3d 314, 329 (3d Cir. 2004).

The panel called upon Congress to fix this incongruity and provide a mechanism for having more current information be available for consideration.[122]

Some courts have sidestepped the issue by taking judicial notice of new facts.[123] Other courts decline to take this route.[124] Relying on a judicial solution is problematic. Judicial notice-taking is restricted by the Federal Rules of Evidence, and such notice-taking does not apply to matters not "generally known within the territorial jurisdiction of the trial court" or matters "[in]capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."[125] Therefore, the use of judicial notice to supplement the factual record is not only an incomplete solution to the problem but also subject to variable application depending on the specific court of appeals. A legislative solution that restores the authority of a court of appeals to remand for further fact finding is preferable.

C. The 30-Day Deadline for Filing Petitions for Review Frustrates Judicial Review

In 1996, IIRIRA reduced the period of time for filing a petition with the courts of appeals for review of a final removal order from 90 days to 30 days.[126] The deadline for seeking review is mandatory and jurisdictional and, generally, not subject to equitable tolling.[127] The deadline was shortened in 1996 in response to concerns about significant delays in removal.[128] For the same reason, IIRIRA also amended the INA so that deportation was no longer automatically stayed upon the filing of a petition for review in a court of appeals.[129] Instead, a separate motion to stay the execution of the removal order must be filed.[130]

In 2007, the Supreme Court ruled in *Bowles v. Russell*, a non-immigration case, that federal courts may not create equitable exceptions to the time permitted to file a motion for appeal, thus putting into question the few court-made equitable exceptions to

---

122 *Id.* at 317. There is administrative relief available under some circumstances. For example, a petitioner for asylum can request a reopening of proceedings at the administrative level under 8 U.S.C. § 1229a(c)(6), and no time restrictions are placed on motions to reopen based on changed country conditions. 8 U.S.C. § 1229a(c)(7)(C)(ii). The information relied upon will often be out of date by the time this decision gets to the federal courts, however, which would lead either to adjudication on a stale record or a continuing series of motions to reopen.

123 *See, e.g.*, Namo v. Gonzales, 401 F.3d 453, 458 (6th Cir. 2005) (taking judicial notice of the collapse of the Saddam Hussein regime); Singh v. Ashcroft, 393 F.3d 903, 905-07 (9th Cir. 2004) (taking judicial notice of the existence of an Indian counterterrorism organization, which was doubted by the IJ).

124 *See, e.g.*, Najjar v. Ashcroft, 257 F.3d 1262, 1278-82 (11th Cir. 2001).

125 Fed. R. Evid. 201(b).

126 8 U.S.C. § 1252(b)(1). The 1990 Immigration Act reduced the time to file an appeal for most noncitizens from six months to 90 days and from 60 to 30 days for noncitizens convicted of aggravated felonies. Immigration Act of 1990, Pub. L. No. 101-649, § 502, 104 Stat. 4978, 4979 (1990). There was no time limit for filing a habeas petition other than the petition had to be filed before deportation.

127 *See* Stone v. INS, 514 U.S. 386, 390-406 (1995) (interpreting 90-day deadline); Dakane v. U.S. Attorney Gen., 371 F.3d 771, 773 n. 3 (11th Cir. 2004) and Skurtu v. Mukasey, 552 F. 3d 651 (8th Cir. 2008) (both interpreting 30-day deadline). The courts of appeals have excused the failure to file a timely petition where the BIA fails to comply with regulations regarding mailing the order of removal to the noncitizen or his counsel or where the BIA provided misleading information regarding review at the court of appeals. *See* Martinez-Serrano v. INS, 94 F.3d 1256, 1259 (9th Cir. 1996) (adopting the rule also followed by the Fifth and Seventh Circuits because "the petitioner should not be penalized for the BIA's failure to comply with the terms of the federal regulations"); Singh v. INS, 315 F.3d 1186, 1188 (9th Cir. 2003) (noting both of these exceptions). *See also* American Immigration Law Foundation Practice Advisory, Suggested Strategies for Remedying Missed Petition for Review Deadlines or Filings in the Wrong Court (2005).

128 *See, e.g.*, H.R. Rep. No. 104-469(I), at 122-123 (1996) ("Illegal aliens also may frustrate removal through taking advantage of certain procedural loopholes in the current removal process," such as being able to obtain multiple continuances of their hearings, failing to appear for a hearing with few adverse consequences, and taking advantage of significant delays in appealing to the Board of Immigration Appeals or to the Federal courts.)

129 *See* INA § 106(a)(3) (1995); INA § 242(b)(3)(B).

130 Nken v. Holder, 556 U.S._, 129 S. Ct. 1749 (2009). In deciding whether to grant a stay of removal, a court of appeals must consider the following factors: (1) whether there is the strong likelihood of applicant's success on the merits, (2) whether applicant will suffer irreparable injury without the stay, (3) whether there is any harm to the opposing party by granting the stay, and (4) whether the granting of the stay is in the public interest. The Court specifically noted that "[a]lthough removal is a serious burden for many aliens, that burden alone cannot constitute the requisite irreparable injury" as an alien can pursue an appeal from outside the United States. 129 S. Ct. at 1761.

the 30-day deadline.[131] Lower courts have followed *Bowles* and refused to permit equitable tolling where the deadline for filing an appeal was statutory.[132]

The 30-day deadline for filing a petition for review can have harsh consequences. It also frustrates review because of the exigencies of removal. While civil appeals from district courts to the courts of appeals must be filed within 30 days of final judgment, 30 days is simply insufficient for petitioners who may be in detention or are without counsel.[133] For example, in *Malvoisin v. Immigration and Naturalization Service*, the petitioner, a citizen of Haiti, sought asylum.[134] Malvoisin was detained at a Pennsylvania facility when the BIA issued its final removal order. She claimed that her attorney did not inform her of the BIA's order. Almost a month later, she was transferred to a facility in New York, and learned of the BIA decision and had five days to file a petition for review.[135] She promptly obtained new counsel, who submitted the petition for review one day late. The Court stated that "failure to file a timely petition might be cause for extending the deadline under a more liberal standard" but adherence to the 30-day limit provided no room for flexibility.[136]

For petitioners who have no counsel or are in detention far from friends and family, the 30-day deadline often poses severe hardship.[137] The 30-day period begins on the date of the order of removal, not the date on which it was served on the petitioner. Receipt of an order may be delayed if the noncitizen has been transferred and unable to provide the new address prior to the BIA mailing the order. Difficulties with language and in obtaining representation to file the appeal render a 30-day period far too short.

Moreover, the BIA decision does not include a reference to the 30-day deadline and as a result, petitioners may not know that they have the right to appeal or that the period within which to file an appeal is very limited, or the circuit in which to file the appeal.[138]

Prior to the REAL ID Act, the 30-day deadline did not preclude habeas review for noncitizens in detention. Now that habeas is no longer available, the courts of appeals are the sole forum for a noncitizen to obtain judicial review of a removal order, but noncitizens must do so within the strict time period. As discussed in greater detail in Part 5 on Representation, the effective assistance of counsel or other qualified representative would facilitate the adjudicative process, including judicial review.

D. Perspectives on the Increased Immigration Case Load at the Courts of Appeals

The rate at which BIA decisions are appealed has increased markedly since 2002. See Table 4-1. In 2001, about 5% of BIA decisions were appealed to the circuit courts. By 2006, over 28% of BIA decisions were appealed, while the percentage fell to just over 25% in 2007. The percentage of decisions appealed, however, understates the burden being placed on the courts of

131 In Bowles v. Russell, 551 U.S. 205, 127 S. Ct. 2360 (2007), the district court reopened the time for Bowles to appeal a judgment but mistakenly gave him 17 days rather than the statutory 14 days within which to file the appeal as prescribed under F. R. App. P. 4(a)(6). Bowles filed the appeal within the 17 day period ordered by the court but after the 14 day period provided in the statute. The Supreme Court affirmed the dismissal for lack of jurisdiction. The Court noted its "longstanding treatment of statutory time limits for taking an appeal as jurisdictional" and that "those decisions have also recognized the jurisdictional significance of the fact that a time limitation is set forth in a statute." 551 U.S. at 210, 127 S. Ct. at 2364. Bowles argued that there were "unique circumstances" that warranted an exception but the Court rejected that argument, noting that "this Court has no authority to create equitable exceptions to jurisdictional requirements, [and thus] use of the 'unique circumstances' doctrine is illegitimate." 551 U.S. at 213, 127 S. Ct. at 2366.

132 *Bowles* has not been applied in cases involving AEDPA's statute of limitations (Diaz v. Kelly, 515 F.3d 149, 153 (2d Cir. 2008)), court rules with no statutory foundation (U.S. v. Frias, 521 F.3d 229 (2nd Cir. 2008)), requirements relating to the form of filing (Estrada v. Scribner, 512 F.3d 1227 (9th Cir. 2008)) and local filing rules (Bilbruck v. BNSF Railway Company, 243 Fed. Appx. 293 (9th Cir. 2007)). *See also* Michael D. Richman and Meghan K. Landrum, *Wrestling With 'Bowles' Mandate: Some Courts Have Applied Strict Standard For Appeals Deadlines; Others Have Avoided Harsh Rulings,* Nat'l L.J., Vol. 30, No. 39 (June 8, 2008).

133 Fed. R. App. P. 4(a)(1)(A).

134 Malvoisin v. INS, 268 F.3d 74, 75 (2nd Cir. 2001).

135 *Id.* at 75.

136 *Id.*

137 Neuman, *supra* note 54, at 143-45 (2006); Nancy Morawetz, *Back to Back to the Future? Lessons Learned from Litigation Over the 1996 Restrictions on Judicial Review*, 51 N.Y.L. Sch. L. Rev. 113, 126 (2006-2007) (noting that the 30-day period presented problems particularly when the REAL ID Act was enacted in 2005).

138 The petition for review must be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings. 8 U.S.C. § 1252(b)(2). The applicable circuit court is not identified in the BIA order and may not be apparent to a petitioner proceeding pro se.

appeals because the absolute number of BIA decisions also increased substantially. Appeals of BIA decisions as a percentage of all federal civil appeals leaped from 3% (or 1,760 cases) in 2001 to a peak of 18% (12,349 cases) in 2005. In 2008, 10,280 BIA decisions were appealed to the courts of appeals, comprising almost 17% of all civil appeals.[139]

This increase in appeals affected the Second and Ninth Circuits the most. From 2002 to 2008, for the Second Circuit, appeals of BIA decisions as a percentage of all federal civil appeals brought in that Circuit went from 10.9% (533) in 2002 to 41.5% (2,865) in 2008. Between 2002 and 2003 alone, the percentage increased from 10.9% to 32.7% (2,081). For the Ninth Circuit, appeals of BIA decisions as a percentage of all federal civil appeals brought in that Circuit went from 26% (2,670) in 2002 to 34% (4,625) in 2008, with the highest percentage coming in 2005 at 41% (6,583).[140] The Ninth and Second Circuits hired additional staff and developed strategies for addressing the increase in immigration appeals.[141]

In October 2003, the ABA Commission on Immigration, and other experts since then, have observed that BIA streamlining appeared to have been partly the cause of the dramatic increase in the percentage of appeals.[142] The burden, however, has not lessened even as the backlog of BIA decisions has abated. The high percentage of appeals and high absolute number of appeals is likely the result of a number of factors including a) the increase in enforcement which leads to an increase in the total number of cases; b) the increased output of BIA decisions, especially summary dismissals which are more likely to be appealed; c) a qualitative change in the administrative process; and d) the perception that the process is politicized, unfair, and unjust.[143] Given the perception that the administrative process is compromised by inadequate resources, bias or caprice, or all of the above, the increase in the number of appeals is not surprising. Noncitizens subject to removal, in many instances risking life and liberty when deported, will seek any and every avenue for review. They will attempt to get over the bars to judicial review by repackaging their claims to fit within the exceptions afforded review. The caseload in the appellate courts is unlikely to be reduced merely by posing more specific jurisdictional hurdles.

E. Assessment of Consolidation of Immigration Appeals in One Circuit

Some stakeholders have suggested that all immigration appeals be consolidated in an existing circuit court or a new circuit court. One proposal made in 2006 by the then-chair of the Senate Judiciary Committee, Senator Arlen Specter, was to consolidate all immigration appeals in the Federal Circuit, the only court of appeals with a specialized docket. The consolidation proposal was criticized by many circuit

139 Table 4-1. *See also* Part 3, Section III, *supra*.

140 Table 4-2.

141 For example, the Ninth Circuit has used a "batching" process in which staff attorneys review and, where appropriate, group cases that raise similar or related issues and assign them to the same panel. If appropriate, a lead case, with qualified immigration counsel, may be designated. Once the lead case is decided, the other cases grouped with the lead case may be summarily decided based on the holding of the lead case. In October 2005, the Second Circuit instituted a "Non-Argument Calendar," or "NAC," to deal with its backlog of asylum cases and was able to adjudicate forty-eight cases a week, with three judges on each case. *Litigation Reduction Hearing, supra* note 8, at 5 (statement of John M. Walker, Jr., Chief Judge, U.S. Court of Appeals for the Second Circuit). Also, *see generally,* Erick Rivero, *Asylum and Oral Argument: The Judiciary in Immigration and the Second Circuit Non-Argument Calendar*, 34 HOFSTRA L. REV. 1497 (2006) (arguing that the NAC is inadequate for the review of asylum claims); Elizabeth Cronin, *When the Deluge Hits and You Never Saw the Storm: Asylum Overload and the Second Circuit*, 59 ADMIN. L. REV 547 (2007); John R.B. Palmer, *The Second Circuit's "New Asylum Seekers": Responses to an Expanded Immigration Docket*, 55 CATH. U. L. REV. 965, 974 (2006).

142 ABA COMMISSION ON IMMIGRATION POLICY, PRACTICE AND PRO BONO, *supra* note 12.

143 *See* discussion in Part 3, Section III.I, *supra*. A number of commentators have expressed the view that streamlining directly led to the increase in the percentage of decisions appealed. For example, Professor Kanstroom of Boston College Law School concluded: "[g]iven the overwhelming dissatisfaction with the quality of BIA review after the adoption of the affirmance without opinion procedure, aliens were even more likely to seek further review by federal courts." Daniel Kanstroom, *The Better Part of Valor: The REAL ID Act, Discretion, and the "Rule" of Immigration Law*, 51 N.Y. L. SCH. L. REV. 161, 165 (2006). *See also* Susan Burkhardt, *The Contours Of Conformity: Behavioral Decision Theory And The Pitfalls Of The 2002 Reforms Of Immigration Procedures*, 19 GEO. IMMIGR. L.J. 35, 85 (Fall 2004) (noting that "the Procedural Reforms appear to have succeeded only in transferring the backlog from the BIA to the federal courts of appeals"); Elizabeth Cronin, *When the Deluge Hits and You Never Saw the Storm: Asylum Overload and the Second Circuit*, 59 ADMIN. L. REV. 547 (2007); John R. B. Palmer, *The Second Circuit's "New Asylum Seekers": Responses to an Expanded Immigration Docket*, 55 CATH. U. L. REV. 965, 974 (2006); 3 CHARLES GORDON, STANLEY MAILMAN, AND STEPHEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE § 81.04[1][c] (1997).

court judges, and Senator Specter withdrew the consolidation proposal before the bill went to the Senate floor.[144] However, the commentary from sitting judges, practitioners and academics at the 2006 hearing remains relevant to any potential renewed discussion of consolidation.[145]

Proponents of consolidation argued that it would (a) bring uniformity to immigration law over time, (b) eliminate forum-shopping, and (c) reduce the pressure on other circuit court dockets.[146] As noted above, the 1996 and 2005 amendments to the INA have resulted in diverse interpretations and numerous circuit court splits, particularly relating to the scope of the courts of appeals's jurisdiction.[147] The Supreme Court takes very few immigration cases; as a result, most splits are not resolved, creating a disparity in the law applied to removal. The outcome of removal proceedings may therefore depend on the district in which the first hearing is held, the locus of which is generally determined by DHS.[148] Some judges in the Ninth Circuit also supported consolidation on the ground that it would discourage forum-shopping.[149]

However, consolidation does not address the cause of the increase in the number of appeals but merely shifts the burden to the chosen or new circuit, thereby creating the largest circuit court of appeals.[150] Nor was there a consensus that uniformity or specialization of immigration law is desirable for its own sake. As Professor Martin observed in his testimony before Congress, circuit splits "are probably beneficial for the overall health of the system, because circuit splits serve the purpose of helping to signal when there are ambiguities in the law, significant constitutional issues, or difficulties in reconciling the many policy objectives our immigration laws serve."[151] Consolidation also would undermine the principle that generalist judges should adjudicate disputes relating to personal liberty.[152] Judge Walker, in his testimony before Congress in 2006, also noted that consolidation would "lose the benefits of having appeals heard in the community where the parties are located."[153] Finally, consolidating immigration appeals in one circuit could

---

144 Congressional Research Service, The Library of Congress, Immigration Litigation Reform 5 (2006) ("It appears that upon further consideration, Senator Specter has decided to drop the consolidation provision and certain other judicial review provisions from current legislative proposals; S. 2611, which he introduced, does not contain these provisions . . . ."), *available at* http://www.ilw.com/immigdaily/news/2006,0516-crs.pdf.

145 *See, e.g.*, *Litigation Reduction Hearing*, *supra* note 8, at 3-5 (statement of Chief Judge Paul R. Michel, Chief Judge of the U.S. Court of Appeals for the Federal Circuit).

146 *E.g.*, *Id.* at 8 (statement of Carlos T. Bea, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit) (explaining his reasons for supporting consolidation in the Federal Circuit: "I think the overwhelming need that is addressed by this [bill] is a need for national uniformity, a national policy.").

147 Opponents of consolidation state that the concern over circuit splits is overblown. As then University of Virginia Law Professor David Martin testified, "the focus on a few well-known circuit splits obscures the vast range of complex issues on which there is no real dispute." *Id.* at 29 (statement of David A. Martin, Professor of Law, University of Virginia) (opposing consolidation).

148 *Id.* at 29 (statement of David A. Martin). *See also* 8 U.S.C. § 1252(b)(2) and 8 C.F.R. § 1003.20(b) (provisions relating to the venue of immigration appeals). Statistics show that some circuits clearly are more likely to reverse than others. *See* Table 3-5 in Part 3, Section III, *supra*. For example, for fiscal year 2008, the overall reversal and remand rate was 12.6%, individual circuit reversal and remand rates ranged from 17.1% for the Seventh Circuit to 2.8% in the Fourth Circuit. The disparity in circuit court reversal rates also is confirmed by the research reported in Table 4-3, which focuses exclusively on asylum cases.

149 Judge Bea of the Ninth Circuit attributes the increase in cases in the Ninth Circuit to the fact that the Ninth Circuit grants asylum applications at a much higher rate than the Fifth Circuit. *Litigation Reduction Hearing*, *supra* note 8, at 8. *See also Id.* at 77 (written submission of Alex Kozinski, Judge, U.S. Court of Appeals for the Ninth Circuit.)

150 *Id.* at 5 (statement of John M. Walker, Jr., Chief Judge, U.S. Court of Appeals for the Second Circuit) (explaining his reasons for opposing consolidation: "First of all, it will do nothing to improve the performance and productivity of the IJs and the BIA, which I think is the core problem in immigration adjudications, and which can only be addressed by additional resources. Second, as has been noted, it will swamp the Federal Circuit with petitions, a nine fold increase at least in its caseload, reducing the time for careful consideration, delaying dispositions and exacerbating the backlog. Third, it will run counter to the firmly accepted idea of our Nation's relying on generalist judges to adjudicate disputes, and it will also run afoul of the policy of the Judicial Conference, which disfavors specialized courts except in limited circumstances.")

151 *Id.* at 29 (statement of David A. Martin).

152 *Id.* at 10 (statement of Jon O. Newman, Senior Judge, U.S. Court Of Appeals for the Second Circuit, Hartford, Connecticut, "The country has been served well by two centuries of leaving those issues in the courts of general jurisdiction manned by men and women selected for their broad experience.")

153 *Id.* at 6 (statement of John M. Walker).

overly politicize the judicial confirmation process for that circuit.[154]

While a proposal to consolidate appeals specifically in one circuit may not be revived, other alternatives that do not compromise the traditional generalist approach to immigration but which attempt to reduce the jurisdictional differences and address swollen case loads should be considered.[155] Significant changes in appeal rates, however, are more likely to come by focusing on reforming earlier stages of the immigration adjudication process.

IV. Recommendations Relating to Judicial Review by Circuit Courts

The ABA previously has noted that the AEDPA, IIRIRA and REAL ID Act "restrictions on federal judicial review are exceptional in scope and establish a dangerous precedent of unreviewable government action. As such, they are incompatible with the basic principles upon which this nation's legal system was founded."[156] Legislation should be enacted that would restore judicial review of immigration decisions to ensure that noncitizens are treated fairly in the adjudication process and also to provide oversight for the government's decision making process.[157]

Our recommendations for judicial review in the circuit courts are in accordance with that principle and apply even if administrative adjudication by the immigration courts and the BIA is moved into an independent agency or restructured as an Article I court.[158] The responsible agencies, noncitizens, and Article I court, if implemented, will benefit from the involvement of the courts of appeals in immigration matters. Generalist courts help counteract the inevitable tendency of specialist courts and agencies to become narrowly focused. Immigration matters, which frequently involve issues relating to personal liberty and human rights, should not be jurisdictionally precluded from the full scope of court of appeals review, whether the adjudicative process is carried out by an administrative agency or by a specialized Article I court. While this Report does not recommend restoration of habeas review, we have given weight to the fact that historically habeas jurisdiction and appeal to the circuit court — two avenues of Article III judicial review — were available. Moreover, the proposed restructuring of the immigration adjudication system is unlikely to be implemented or achieve its goals for a number of years. The availability in the interim of expanded review in the courts of appeals proposed herein will facilitate the transition by providing necessary oversight.

A. The 1996 Amendments Precluding Judicial Review of Certain Discretionary Decisions Should be Repealed

As discussed above in Section III.A, the 1996 amendments to the INA restricted judicial review of discretionary decisions. Prior to the 1996 legislative changes, the courts reviewed discretionary decisions under a deferential "abuse-of-discretion" standard. We recommend that Congress enact legislation restoring such review. Moreover, such legislation should provide that the courts apply a presumption in favor of judicial review and specifically reject attempts to insulate more and more actions from review by labeling them as discretionary. We advocate a model of review along the lines of the APA. The APA recognizes the value and necessity of administrative discretion, but reflects a presumption in favor of review. Under the APA, discretionary decisions will not be disrupted by courts as long as they are not arbitrary, capricious, or an abuse of discretion. Review under this standard would balance the need for agency flexibility and provide a judicial check on executive power in an area of law such as immigration where personal and civil liberties are at stake.

---

154 *Id.* at 6 (statement of John M. Walker).

155 For example, in August 2007, Judge Bea proposed a multi-circuit immigration panel modeled after the multi-district litigation panels used to consolidate a large number of cases all raising the same issue, such as asbestos litigation. Honorable Carlos T. Bea, Judge, U.S. Court of Appeals for the Ninth Circuit, Address to the Board of Immigration Appeals and Immigration Judges (August 10, 2007), *available at* http://www.bibdaily.com/pdfs/Bea%20address%20to%20BIA%20and%20IJ%202007%20annual%20convention.pdf. Appointing specialized panels of judges also was raised by Judge Jon O. Newman. *See Litigation Reduction Hearing*, *supra* note 8, at 11.

156 ABA, Ensuring Fairness and Due Process in Immigration Proceedings 8 (2008), *available at:* http://www.abanet.org/poladv/transition/2008dec_immigration.pdf.

157 *Id.*

158 *See* Part 6, System Restructuring, *infra*.

B. Congress Should Allow Courts of Appeals to Remand for Further Fact Finding in Sufficiently Compelling Circumstances

As discussed above in Section III.B, the elimination of habeas corpus review for final removal orders and enactment of § 1252(a)(1), which precludes the court of appeals from remanding for further fact finding, have significantly curtailed the petitioner's ability to present new evidence. We recommend that Congress repeal the provisions in § 1252(a)(1) that prevent the courts of appeals from remanding cases for further fact finding and return to the standard provided in the Hobbs Act, which was in place prior to the IIRIRA amendments, and permit remand where "the additional evidence is material" and "there were reasonable grounds for failure to adduce the evidence before the agency."[159] While this proposal does not restore historical habeas review, it attempts to obtain one of the benefits of habeas jurisdiction by allowing the record to be supplemented where appropriate so that the parties will have a full and fair opportunity to develop evidence and present issues of law and practice affecting the outcome of the removal proceeding.

C. The Deadline for Filing a Petition for Review to the Courts of Appeals Should Be Extended to 60 Days with a Provision to Request Additional Time, and a Final Removal Order Should Specify the Circuit for Appeal

As discussed above in Section III.C, petitioners who may be in detention or are without counsel may not be aware of their appeal rights, the deadline within which an appeal must be filed, or where the appeal must be filed. We recommend that regulations be amended to require that each final removal order in which the government prevails state that an appeal from the order may be filed with the U.S. Court of Appeals for the circuit in which the immigration court is located, identify the applicable circuit court for appealing the order, and state that the petition to appeal must be filed within 30 days of the date of the final order of removal (or such time period as may be provided in the proposed amendment to 8 U.S.C. § 1252(b)(1) discussed below).[160]

A period of 30 days in which to petition for appeal, however, is unduly short especially for petitioners in detention or without representation. We recommend that the INA be amended to extend the current 30-day deadline to file a petition for review with the court of appeals to 60 days with the possibility of a 30-day extension where the petitioner is able to show excusable neglect or good cause. There is precedent for having a statutory 60-day period for filing an appeal of an agency decision. In other situations where the United States is a party, the petitioner is provided with 60 days to file an appeal.[161] There is no apparent reason why petitioners in immigration cases should be subject to a shorter time in which to appeal a case than any other case in which the United States is a party. General congressional frustration regarding delay in removal led to a reduction in the period of time within which to file an appeal. However, the delays in removal are the result of factors other than the time period for filing an appeal, so being unduly harsh on the period of time in which to appeal does not address the reasons why the removal process takes too long. Moreover, a petition for appeal no longer entitles the petitioner to an automatic stay of removal.

159 As noted in Section III.B, *supra*, there is a developed body of case law applying the Hobbs Act standard for remand.

160 *See* 8 C.F.R. § 1003.1(f).

161 Under the Federal Rules of Civil Procedure, when the United States, or an officer or agency of the United States, is a party in the case, all parties have 60 days to file a notice of appeal of the final judgment. Fed. R. App. P. 4(a)(1)(B). The Hobbs Act also provides for a 60-day period to file a petition for review of certain agency decisions with the court of appeals. 28 U.S.C. §§ 2342, 2344.

In addition, given the likelihood (based upon actual experience) that detention will cause difficulties in filing a petition for appeal, we recommend that upon a motion and showing of "excusable neglect or good cause" the petitioner be afforded an additional 30 days within which to file an appeal. In the non-immigration context, federal rules regarding deadlines for both criminal and civil appeals to the circuit courts currently provide for extensions of time where excusable neglect or good cause can be shown.[162] We recommend that the INA be amended to expressly provide that the courts of appeals may extend the time to file a petition for appeal in accordance with the "excusable neglect and good cause" standard as applied under Federal Rule of Appellate Procedure 4(a)(5), which governs appeals from district court judgments.[163] We recommend that the motion for extension of time to petition for appeal be filed with the clerk of the appropriate circuit court.

162 Fed. R. App. P. 4(a)(5)(i)-(ii) (allowing extension to the 30-day deadline for most civil cases upon a showing of "excusable neglect or good cause"). The Advisory Committee Notes state that a showing of excusable neglect must be made if the motion is filed after the time to file an appeal has expired while an extension to file an appeal upon a showing of good cause is allowed only if the motion is filed before the expiration of the 30 days. *See* Advisory Committee Notes to 1979 Amendment to Fed. R. App. P. 4(a)(5); *see also* Marsh v. Richardson, 873 F.2d 129, 130 (6th Cir. 1989) (equitable tolling granted only in "unique or extraordinary circumstances"). *See also* Fed. R. App. P. 4(b)(4) (allowing extension of the time to file an appeal in a criminal case upon a showing of "excusable neglect or good cause"). Note, however, that criminal defendants (who do have the right to counsel) have only ten days to file an appeal.

163 *See, e.g.*, Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership, 507 U.S. 380, 395 (1993) (Under Rule 4(a)(5) excusable neglect is an equitable determination, "taking account of all relevant circumstances surrounding the party's omission," such as "the danger of prejudice to the [other party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith."); Mendez v. Knowles, 556 F.3d 757 (9th Cir. 2009) (excusable neglect where the attorney mailed the notice of appeal in time but document took longer than expected to reach the court); Marquez v. Mineta, 424 F.3d 539, 541 (7th Cir. 2005) ("simple miscalculation" of the filing deadline not excusable neglect); Lowry v. McDonnell Douglas Corporation, 211 F. 3d 457, 464 (8th Cir. 2000) (excusable neglect not found when counsel misapplied "clear and unambiguous procedural rules").

Part 4:
Judicial Review By Circuit Courts
Appendix of Tables

Table 4-1
BIA Decisions Appealed to Courts of Appeals: 1998-2008

FISCAL YEAR	TOTAL APPEALS FILED IN U.S. COURT OF APPEALS	TOTAL APPEALS OF BIA DECISIONS FILED IN U.S. COURT OF APPEALS	PERCENTAGE OF TOTAL APPEALS THAT ARE FROM BIA	TOTAL NUMBER OF BIA DECISIONS[164]	% OF BIA DECISIONS APPEALED
1998	53,805	1,936	3.6%	28,763	6.7%
1999[165]	54,693	1,731	3.2%	23,011	7.5%
2000	54,697	1,723	3.2%	21,380	8.1%
2001	57,464	1,760	3.1%	31,800	5.5%
2002	57,555	4,449	7.7%	47,326	9.4%
2003[166]	60,847	8,833	14.5%	48,042[167]	18.4%
2004	62,762	10,812	17.2%	48,698	22.2%
2005	68,473	12,349	18%	46,338	26.6%
2006	66,618	11,911	17.9%	41,475	28.7%
2007	58,410	9,123	15.6%	35,394	25.8%
2008[168]	61,104	10,280	16.8%	38,369	26.7%

164 Total Number of BIA Decisions Data from 1999-2002, *available in* the U.S. Department of Justice, Executive Office for Immigration Review, FY 2002 Statistical Year Book S2 (April 2003), FY 2003 Statistical Year Book S2 (April 2004), FY 2004 Statistical Year Book S2 (March 2005) and FY 2005 Statistical Year Book S2 (February 2006) *available at* http://www.usdoj.gov/eoir/statspub/fy02syb.pdf, http://www.usdoj.gov/eoir/statspub/fy03syb.pdf, http://www.usdoj.gov/eoir/statspub/fy04syb.pdf and http://www.usdoj.gov/eoir/statspub/fy05syb.pdf.

165 Total Appeals and Total Appeals of BIA Decisions Data from 1998-2002 *available at* http://www.uscourts.gov/judbus2002/appendices/b03sep02.pdf.

166 Total Appeals and Total Appeals of BIA Decisions Data from 2003-2007 *available at* http://www.uscourts.gov/judbus2007/appendices/B03Sep07.pdf.

167 Total Number of BIA Decisions Data from 2003-2008, *available in* the U.S. Department of Justice, Executive Office for Immigration Review, FY 2007 Statistical Year Book G1 (April 2008) and FY 2008 Statistical Year Book S1 (March 2009) *available at* http://www.usdoj.gov/eoir/statspub/fy07syb.pdf and http://www.usdoj.gov/eoir/statspub/fy08syb.pdf.

168 Total Appeals and Total Appeals of BIA Decisions Data for 2008 *available in* the 2008 Year-End Report on the Federal Judiciary 10 (2008) *available at* http://www.supremecourtus.gov/publicinfo/year-end/2008year-endreport.pdf.

Table 4-2[169]
Total Appeals by Circuit: 2000-2008

	2000	2001	2002	2003	2004	2005	2006	2007	2008
Total Appeals	54,697	57,464	57,555	60,847	62,762	68,473	66,618	58,410	61,104
BIA	1,723	1,760	4,449	8,833	10,812	12,349	11,911	9,123	10,280
BIA as % of Total	3.2	3.1	7.7	14.5	17.2	18.0	17.9	15.6	16.8
DC Circuit									
Total	1,506	1,401	1,126	1,121	1,390	1,379	1,281	1,310	1,307
BIA			-	7	1	-	-	-	-
BIA as % of Total				0.6	0.07				
1st Circuit									
Total	1,463	1,762	1,667	1,844	1,723	1,912	1,852	1,863	1,631
BIA			54	140	140	222	219	214	172
BIA as % of Total			3.2	7.6	8.1	11.6	11.8	11.5	10.5
2nd Circuit									
Total	4,892	4,519	4,870	6,359	7,008	7,035	7,029	6,334	6,904
BIA			533	2,081	2,632	2,550	2,640	2,177	2,865
BIA as % of Total			10.9	32.7	37.6	36.2	37.6	34.4	41.5

169 Data from 2000-2001 *available at* http://www.uscourts.gov/judbus2003/appendices/b3.pdf. Data for 2000 and 2001 did not include breakdown for BIA appeals. Data from 2002-2003 *available at* http://www.uscourts.gov/judbus2006/appendices/b3.pdf. Data from 2004-2008 *available at* http://www.uscourts.gov/judbus2008/appendices/B03Sep08.pdf.

Table 4-2[169]
Total Appeals by Circuit: 2000-2008 (continued)

	2000	2001	2002	2003	2004	2005	2006	2007	2008
3rd Circuit									
Total	3,482	3,860	3,643	3,957	3,871	4,498	4,503	3,924	4,054
BIA			207	471	518	690	748	602	553
BIA as % of Total			5.7	11.9	13.4	15.3	16.6	15.3	13.6
4th Circuit									
Total	4,689	5,303	4,658	4,887	4,957	5,307	5,460	4,542	5,185
BIA			101	290	348	352	317	244	257
BIA as % of Total			2.1	5.9	7.02	6.6	5.8	5.4	5.0
5th Circuit									
Total	8,253	8,642	8,784	8,613	8,509	9,052	9,479	8,055	7,667
BIA			303	393	483	593	644	467	560
BIA as % of Total			3.4	4.6	5.7	6.6	6.8	5.8	7.3
6th Circuit									
Total	4,916	4,853	4,619	4,964	4,841	5,211	5,151	4,818	4,853
BIA			127	345	333	316	401	294	351
BIA as % of Total			2.7	7	6.9	6.1	7.8	6.1	7.2

169 Data from 2000-2001 *available at* http://www.uscourts.gov/judbus2003/appendices/b3.pdf. Data for 2000 and 2001 did not include breakdown for BIA appeals. Data from 2002-2003 *available at* http://www.uscourts.gov/judbus2006/appendices/b3.pdf. Data from 2004-2008 *available at* http://www.uscourts.gov/judbus2008/appendices/B03Sep08.pdf.

Table 4-2[169]
Total Appeals by Circuit: 2000-2008 (continued)

	2000	2001	2002	2003	2004	2005	2006	2007	2008
7th Circuit									
Total	3,461	3,455	3,418	3,517	3,377	3,789	3,634	3,227	3,307
BIA			93	234	255	257	202	172	187
BIA as % of Total			2.7	6.7	7.6	6.8	5.6	5.3	5.7
8th Circuit									
Total	3,353	3,165	3,034	3,190	3,101	3,611	3,312	3,020	3.022
BIA			78	207	167	133	124	122	125
BIA as % of Total			2.6	6.5	5.4	3.7	3.7	4	4.1
9th Circuit									
Total	9,383	9,147	10,342	12,872	14,274	16,037	14,636	12,549	13,577
BIA			2,670	4,206	5,368	6,583	5,862	4,280	4,625
BIA as % of Total			26	32.7	37.7	41	40.1	34.1	34.0
10th Circuit									
Total	2,800	2,656	2,758	2,540	2,646	2,911	2,742	2,407	2,226
BIA			54	105	97	81	89	71	65
BIA as % of Total			2.0	4.1	3.7	2.8	3.2	2.9	3.0

169 Data from 2000-2001 *available at* http://www.uscourts.gov/judbus2003/appendices/b3.pdf. Data for 2000 and 2001 did not include breakdown for BIA appeals. Data from 2002-2003 *available at* http://www.uscourts.gov/judbus2006/appendices/b3.pdf. Data from 2004-2008 *available at* http://www.uscourts.gov/judbus2008/appendices/B03Sep08.pdf.

Table 4-2[169]
Total Appeals by Circuit: 2000-2008 (continued)

	2000	2001	2002	2003	2004	2005	2006	2007	2008
11th Circuit									
Total	7,034	7,067	7,535	6,983	7,065	7,731	7,539	6,631	7,371
BIA			229	354	470	572	665	480	520
BIA as % of Total			3.0	5.1	6.7	7.4	8.8	7.2	7.1

Table 4-3[170]
Reversal and Remand Rates for Asylum Cases by Circuit Court: 2004-2005

CIRCUIT COURT	PERCENTAGE REVERSAL AND REMAND RATE
All Circuit Courts Combined	15.4%
First Circuit	12.8%
Second Circuit	17.1%
Third Circuit	11.8%
Fourth Circuit	4.1%
Fifth Circuit	3.2%
Sixth Circuit	12.7%
Seventh Circuit	36.1%
Eighth Circuit	11.3%
Ninth Circuit	19.5%
Tenth Circuit	9.1%
Eleventh Circuit	3.2%

169 Data from 2000-2001 *available at* http://www.uscourts.gov/judbus2003/appendices/b3.pdf. Data for 2000 and 2001 did not include breakdown for BIA appeals. Data from 2002-2003 *available at* http://www.uscourts.gov/judbus2006/appendices/b3.pdf. Data from 2004-2008 *available at* http://www.uscourts.gov/judbus2008/appendices/B03Sep08.pdf.

170 Ramji-Nogales et al., *supra* note 7, at 362.

5

Representation

Reforming the Immigration System

Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases

Prepared by Arnold & Porter LLP for the American Bar Association Commission on Immigration

American Bar Association
Commission on Immigration
740 Fifteenth Street, NW
Washington, DC 20005-1022
202-662-1005

Part 5: Representation
Table of Contents

I. Introduction on Representation 5-3
II. Background on Representation 5-3
A. The Current State of the Law 5-3
1. Right to Representation 5-3
2. Right to Effective Counsel 5-4
B. Representation of Noncitizens 5-5
C. Assistance in Obtaining Counsel 5-6
1. Legal Orientation Program 5-6
2. Pro Bono 5-6
3. Other Programs and Efforts 5-7
III. Issues Relating to Representation 5-8
A. Scope of the Problem 5-8
B. Barriers to Access 5-8
C. Consequences of Inadequate Representation 5-9
IV. Recommendations Relating to Representation 5-10
A. Implement a Right to Representation 5-11
1. Recognize a Right to Representation in Certain Cases 5-11
2. Extend the Reach of the Legal Orientation Program 5-12
3. Implement a Legal Orientation Program Screening Process 5-13
4. Source of Representatives 5-14
5. Expense to the Government of Representation 5-15
B. Improve Quality of Representation 5-16
1. Punish Attorneys Who Do Not Meet the Code of Conduct 5-16
a. Allow for Contempt Authority 5-16
b. Strictly Enforce Prohibitions Against the Unauthorized Practice of Law 5-17
2. Promote Efforts to Expand Sources of Representatives 5-17
a. Increase the Number of Agencies Recognized by the BIA and Allow Them to Charge More Than a Nominal Fee 5-17
b. Improve Resources for Pro Se Litigants 5-18
c. Expand Pro Bono 5-18
d. Continue Efforts to Maximize Usefulness of the Pro Bono Service Providers List 5-18
APPENDIX OF TABLES — REPRESENTATION 5-19
Table 5-1: Court Proceedings Completed — Percentage of Represented Cases 5-20
Table 5-2: IJ Appeal Decisions — Percentage of Represented Cases 5-20

Part 5: Representation

I. Introduction on Representation

Throughout the U.S. immigration system, increased representation of noncitizens has the potential to render benefits to noncitizens, to government decision makers, and to the immigration system as a whole. A system with widespread representation would be not only fairer, but also more efficient.

Persons who seek to immigrate to the United States face substantial obstacles and high stakes. Noncitizens typically are not fluent in English, are ethnic or racial minorities in the United States, and lack adequate financial resources. Moreover, the American system of immigration adjudication is complex and difficult to navigate. Finally, the stakes for many noncitizens are high: they face loss of livelihood, permanent separation from U.S. family members, or even persecution or death if deported to their native countries.

Against this backdrop, representation is arguably at least as critical in the immigration context as in the criminal context. This is particularly so given the increased consequence of criminal convictions and admissions of criminal conduct in removal criteria, and the trend towards criminalizing immigration violations. Moreover, the disparity in outcomes of immigration proceedings depending on whether noncitizens are unrepresented or represented is striking. In fact, a study on the issue found that representation by counsel was the "single most important factor affecting the outcome of [an asylum] case."[1] Representation by counsel and other properly trained and accredited representatives will tend to even the playing field.[2]

In addition, representation has the potential to increase the efficiency, and thereby reduce the costs, of at least some adversarial immigration proceedings. For instance, in hearings before the immigration courts, fact-finders can more readily grasp relevant facts and assess legal arguments if presented by a competent, trained representative. Delays in processing may also be reduced, resulting in lower detention and hearing costs.

The sections that follow provide an overview of the current state of, problems with, and recommended reforms to the representation of noncitizens in the U.S. immigration adjudication system. Presently, a noncitizen has a right to counsel in removal proceedings. The INA states that any representation shall be at "no expense to the government," although some attorneys construe the statute to allow agencies to fund counsel on a voluntary basis from existing revenue sources. Noncitizens may be represented not only by attorneys and law students, but also by other persons accredited by the Board of Immigration Appeals ("BIA"), including accredited representatives from recognized charitable organizations and family members. Nonetheless, many barriers to representation persist. To address these problems, in the absence of legislation providing for appointed counsel for all indigent respondents in removal proceedings, and appropriating funds for the same — which we firmly view as the optimal solution — we recommend (1) the recognition of a right to representation, at a minimum, for indigent noncitizens in removal proceedings who are potentially eligible for relief from removal and cannot otherwise obtain legal counsel, and for unaccompanied minors and persons with mental disabilities and illnesses in all cases; (2) the expansion of programs to provide information and support to unrepresented noncitizens; and (3) the implementation of measures to improve the quality of representation.

II. Background on Representation

A. The Current State of the Law

1. Right to Representation

Current regulations establish the right of a noncitizen to obtain representation in a removal proceeding but do not *require* the government to provide representation. The Immigration and Nationality Act ("INA") states that any representation a noncitizen may obtain shall be at "no expense to the government."[3] A 1995 Opinion from the Office of the General Counsel of Immigration Service discussed this provision of the INA and concluded that the "no expense language," taken together with a statute

1 Jaya Ramji-Nogales, Andrew I. Schoenholtz, and Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295, 340 (2007) (citing Donald Kerwin, *Revisiting the Need for Appointed Counsel*, Insight (Migration Policy Inst.), Apr. 2005, at 1). For an expanded version of the *Refugee Roulette* study, with commentary by scholars from Canada and the United Kingdom as well as from the United States, please see Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform (NYU Press 2009).

2 Ramji-Nogales et al., *supra* note 1, at 384.

3 Immigration and Nationality Act ("INA"), 8 U.S.C. § 1362 (2006).

interpreted to give the Department of Justice ("DOJ") the authority to litigate cases,[4] prohibited "using appropriated funds to pay the salaries of persons representing noncitizens."[5] Others have taken the position that the provision is not so restrictive, and some do not construe the statute to preclude agencies from funding counsel on a voluntary basis from general appropriations.[6]

In practice, the courts apply a case-by-case approach to determine whether the Fifth Amendment requires counsel to be appointed for noncitizens in certain immigration cases.[7] This standard was first set out in *Aguilera-Enriquez v. INS.*[8] In this case, the Sixth Circuit considered a constitutional challenge to the no-expense statute. The court held that "the test for whether due process requires the appointment of counsel for an indigent noncitizen is whether, in a given case, the assistance of counsel would be necessary to provide 'fundamental fairness' — the touchstone of due process."[9] The Circuit Courts generally follow this case-by-case approach and reject an absolute right to appointed counsel in removal proceedings.[10] The application of this standard, however, has led to the denial of appointed counsel in every published case.[11] The American Bar Association ("ABA") has previously criticized this case-by-case approach, noting that it is "unworkable because, as a practical matter, there is no way to know if the absence of counsel has been harmless or not."[12]

2. Right to Effective Counsel

The DOJ has recognized a noncitizen's right to effective assistance of counsel. The DOJ's position on the right to effective counsel was originally set out in *In re Lozada,* a BIA decision recognizing that ineffective assistance of counsel in an immigration proceeding

---

4 5 U.S.C. § 3106. The opinion interpreted this statute as conferring upon the DOJ the authority to litigate cases "in which the United States, an agency, or employee thereof is a party or is interested."

5 Donald Kerwin, *Revisiting the Need for Appointed Counsel*, Insight (Migration Policy Inst.), Apr. 2005, at 1, 7-8 (citing Immigration and Naturalization Service Office of Gen. Counsel, Funding of a Pilot Project for the Representation of Aliens in Immigration Proceedings (Dec. 21, 1995)).

6 *See,* e.g., American Bar Association ("ABA"), Ensuring Fairness and Due Process in Immigration Proceedings 2 (2008), *available at* http://www.abanet.org/poladv/transition/2008dec_immigration.pdf ("This provision does not necessarily preclude government-funded counsel, it merely provides that counsel need not be provided as a matter of right") [hereinafter Ensuring Fairness]; Kerwin, *supra* note 5, at 9 (noting that "[t]he well-established right to government-funded counsel in other civil proceedings also argues against the 'no expense' restriction"). *See also* Catholic Legal Immigration Network, Inc. et al., Petition for Rulemaking to Promulgate Regulations Governing Appointment of Counsel for Immigrants in Removal Proceedings, at 6-8 (June 29, 2009) **,** *available at* http://www.bc.edu/centers/humanrights/meta-elements/pdf/Petition_for_Rulemaking_for_Appointed_Counsel.pdf (asserting that immigration judges may appoint counsel where appointment of counsel would result in overall savings to the Government) [hereinafter Petition for Rulemaking].

7 *See* Reno v. Flores, 507 U.S. 292, 306 (1993) ("[i]t is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings."); Michelson v. INS, 897 F.2d 465, 468 (10th Cir. 1990) (noting that "[w]hile a petitioner is entitled to due process in a deportation proceeding, due process is not equated automatically with a right to counsel. The [F]ifth [A]mendment guarantee of due process speaks to fundamental fairness; before we may intervene based upon a lack of representation, petitioner must demonstrate prejudice which implicates the fundamental fairness of the proceeding."); Trench v. INS, 783 F.2d 181, 183 (10th Cir. 1986) ("there is no right to appointed counsel in deportation proceedings, and 'the fact that an alien is without counsel is not considered a denial of due process, if he does not show that he was prejudiced thereby.'"). The courts have only recognized an indigent noncitizen's right to counsel under the Fifth Amendment, and not the Sixth Amendment. Kerwin, *supra* note 5, at 8 (noting that "[c]ourts have uniformly rejected a Sixth Amendment right to counsel in civil removal proceedings"). In Gideon v. Wainwright, the court held that indigent criminal defendants have a Sixth Amendment right to government paid counsel. 372 U.S. 335, 344 (1963). However, this right has not been extended to indigent noncitizens facing removal. As discussed in Section IV.A.2.a, *infra,* the ABA has recommended that certain classes of noncitizens have the right to counsel. *See* ABA Commission on Immigration, Report to the House of Delegates 9 (Feb. 2006), *available at* http://www.abanet.org/publicserv/immigration/107a_right_to_counsel.pdf. In support of its recommendation, the ABA noted, among other things, that the government does not guarantee representation to indigent noncitizens in removal proceedings, although they are as "similarly complex, adversarial, and consequential" as criminal proceedings. *See id.* at 5.

8 Aguilera-Enriquez v. INS, 516 F.2d 565 (6th Cir. 1975), *cert denied*, 423 U.S. 1050 (1976).

9 *Id.* at 568, quoting Gagnon v. Scarpelli, 411 U.S. 778 (1973).

10 Beth J. Werlin, *Renewing the Call, Immigrants' Right to Appointed Counsel in Deportation Proceedings*, 20 B.C. Third World L.J. 393, 395 (2000).

11 Harvard Law Review Ass'n, *A Second Chance: The Right to Effective Assistance of Counsel in Immigration Removal Proceedings*, 120 Harv. L. Rev. 1544, 1549 (2007) (noting that there are no published decisions requiring the appointment of counsel in order to meet due process); Michael Kaufman, *Detention, Due Process, And The Right To Counsel In Removal Proceedings*, 4 Stan. J. Civ. Rts. & Civ. Liberties 113, 137 (2008); Werlin, *supra* note 10, at 395.

12 ABA Commission on Immigration, Recommendation Adopted by the House of Delegates 6 (Feb. 13, 2006), *available at* http://www.abanet.org/leadership/2006/midyear/daily_journal/107a.doc.

may be a violation of due process.[13] In January 2008, former Attorney General Mukasey reviewed the right-to-counsel issue *sua sponte* and decided that noncitizens in removal proceedings do not have a Fifth Amendment right to effective counsel.[14] This decision was vacated on June 3, 2009 by Attorney General Holder,[15] who acknowledged the high stakes of immigration proceedings and the vulnerability of noncitizens to abuse. Attorney General Holder stated that "[t]he integrity of immigration proceedings depends in part on the ability to assert claims of ineffective assistance of counsel."[16]

B. Representation of Noncitizens

Under current regulations, noncitizens may be represented by attorneys admitted to the bar of any State or the District of Columbia; by law students, subject to certain requirements; and by "accredited representatives" or "reputable individuals" authorized by the BIA.[17] Accredited representatives fall into two categories: those who may represent a noncitizen in matters before the Department of Homeland Security ("DHS") and those who may represent a noncitizen in matters before DHS and immigration courts, i.e., "second level accredited representatives."[18] Law students and law graduates not yet admitted to the bar may serve as representatives, so long as (1) they attend or attended an accredited U.S. law school; (2) the noncitizen requests such representation; (3) the representative, if a law student, files a statement that he or she is supervised by a faculty member, licensed attorney or accredited representative as part of a legal aid program or clinic, and appears without financial compensation from the noncitizen; (4) if the representative is a non-admitted law graduate, the representative files a statement that he or she is under the supervision of a licensed attorney or accredited representative and appears without financial compensation from the noncitizen; and (5) the appearance is permitted by the official before whom they wish to appear.[19]

Non-attorney "accredited representatives" may also represent a noncitizen before the DHS, the BIA, and the immigration courts.[20] Accredited representatives must be individuals designated to practice by a non-profit religious, charitable, social service, or similar organization established in the United States. Such organizations must establish that they charge only nominal fees and assess no excessive membership dues for persons given assistance, and that they have adequate knowledge, information, and experience.[21] Some examples of recognized organizations are the local affiliates of the Catholic Legal Immigration Network, Inc. and the Lutheran Immigration and Refugee Service.

Another broad category of representatives is those deemed by immigration officials to be "reputable individuals." A "reputable individual" is a person who appears before the immigration tribunal as an individual at the request of the noncitizen, is not financially compensated, has a pre-existing relationship with the represented person, and whose appearance is permitted by the official before whom the person wishes to appear.[22] The pre-existing relationship requirement may be waived at the discretion of the immigration official where adequate representation would not otherwise be available.[23]

Family members may also represent a noncitizen in immigration proceedings. In the case of a child, a parent or legal guardian may act as the child's

13 *In re* Lozada, 19 I. & N. Dec. 637, 638 (B.I.A. 1988).

14 *See In re* Compean, 24 I. & N. Dec. 710, 714 (A.G. 2009). This opinion overruled two BIA decisions: *In re* Lozada, 19 I. & N. Dec. at 637, and *In re* Assaad, 23 I. & N. Dec. 553 (B.I.A. 2003), which had previously upheld such rights.

15 *In re* Compean, 25 I. & N. Dec. 1 (A.G. 2009).

16 *See* Press Release, Department of Justice, Attorney General Vacates Compean Order, Initiates New Rulemaking to Govern Immigration Removal Proceedings (June 3, 2008), *available at* http://www.usdoj.gov/opa/pr/2009/June/09-ag-547.html.

17 *See* 8 C.F.R. §1292.1(a)(3)-(4).

18 *See* 8 C.F.R. § 1292.2(d). ("An organization may apply to have a representative accredited to practice before the Service alone or the Service and the Board (including practice before immigration judges)").

19 8 C.F.R. § 1292.1(a)(2).

20 *Id.* § 1292.2(a)

21 *Id.*

22 *Id.* § 1292.1(a)(3).

23 *Id.* § 1292.1(a)(3)(iii).

representative.[24] An adult may be represented by a family member whom the immigration court has authorized to provide representation and found to be a reputable individual.[25]

Finally, an accredited official of the foreign country to which the noncitizen owes allegiance may act as a representative.[26] The official must appear in an official capacity and with the consent of the noncitizen.[27]

C. Assistance in Obtaining Counsel

1. Legal Orientation Program

The Executive Office for Immigration Review ("EOIR") established the Legal Orientation Program ("LOP") in 2003 to assist detained individuals in removal proceedings.[28] This program provides individuals who appear before immigration agencies and tribunals with information regarding basic immigration law and procedure before immigration courts.[29] The program has three parts. First, participants receive general legal and procedural instruction in an interactive group orientation. Second, the non-represented individual has the option to receive legal information relevant to his or her case from a knowledgeable legal service provider in an individual orientation. Finally, depending on a detainee's situation (having potential grounds for relief or wishing to voluntarily depart the country), he or she may receive either a referral for pro bono counsel or self-help legal materials and basic training.[30] He or she is also provided with a list of free legal service providers organized by state.[31]

EOIR has contracted with the Vera Institute of Justice ("Vera") to administer the program. Through Vera sub-contracts with non-governmental organizations ("NGOs"), EOIR provides its LOP at 25 sites nationwide,[32] and has served around 180,000 detainees from the program's inception in 2003 through June 30, 2009.[33] As the expansion of detention has outpaced the expansion of funding for LOP, however, the number of people receiving LOP services represents a shrinking percentage of the overall detained immigration court population.

A study conducted by Vera shows how LOP contributes to the efficiency of the immigration adjudication system. Vera found that cases for LOP participants move an average of 13 days faster through the immigration courts, and that fewer program participants fail to appear for the hearings upon release from detention.[34]

2. Pro Bono

The BIA has implemented a Pro Bono Project to assist detained persons with appeals before that tribunal.[35] This project is a joint endeavor between EOIR and several NGOs, including the Catholic Legal Immigration Network, Inc., the Capital Area Immigrants' Rights Coalition, the National Immigration Project of the National Lawyers Guild, and the

---

24 Executive Office for Immigration Review, U.S. Dep't of Justice, Immigration Court Practice Manual 28 (2008), *available at* http://www.usdoj.gov/eoir/vll/OCIJPracManual/Chap%202.pdf; *see also* 8 C.F.R. § 1292.1(a)(3)(iii).

25 Executive Office for Immigration Review, U.S. Dep't of Justice, Immigration Court Practice Manual 28, *supra* note 24.

26 *Id.* § 1292.1(a)(5).

27 *Id.*

28 *See* U.S. Department of Justice Fact Sheet, EOIR's Legal Orientation and Pro Bono Program (July 18, 2008) [hereinafter LOP Fact Sheet]. *See also* Executive Office for Immigration Review, U.S. Dep't of Justice, EOIR Legal Orientation and Pro Bono Program, http://www.usdoj.gov/eoir/probono/MajorInitiatives.htm (last visited Dec. 22, 2009) [hereinafter LOP Website].

29 LOP Fact Sheet, *supra* note 28, at 1.

30 *Id.*

31 The list of free legal service providers is available on request from the Executive Office for Immigration Review ("EOIR"), or online on the EOIR website, http://www.usdoj.gov/eoir/probono/states.htm (last visited Dec. 22, 2009). EOIR is required by regulation to provide the list to all individuals in removal proceedings. *See* 8 C.F.R. § 1003.61. The list is currently maintained by the Office of the Chief Immigration Judge and updated on a quarterly basis. *Id.*

32 *See* News Release, U.S. Department of Justice, EOIR Adds Twelve New Legal Orientation Sites 1 (Oct. 15, 2008), *available at* http://www.usdoj.gov/eoir/press/08/LegalOrientationProgramExpands101508.htm.

33 Interview with Oren Root, Director, Center on Immigration and Justice, Vera Institute of Justice.

34 *See* EOIR Adds Twelve New Legal Orientation Sites, *supra* note 32.

35 *See* LOP Fact Sheet, *supra* note 28.

American Immigration Council (formerly American Immigration Law Foundation).[36] Using criteria established by the NGOs, cases suitable for pro bono representation are reviewed, summarized, and distributed to pro bono representatives throughout the United States.[37] Pro bono representatives accepting a case receive a copy of the file and are usually granted additional time to file the appeal brief.[38]

As part of former Attorney General Gonzales's 22-point plan to improve the performance of the immigration courts, EOIR formed a committee to oversee the expansion and improvement of that office's pro bono programs.[39] The committee is composed of immigration judges ("IJ"s) and representatives of the BIA and DHS, as well as members of the private immigration bar.[40]

As a result of the committee's work, in March 2008 EOIR issued a new policy for pro bono activities in immigration courts.[41] The policy, which is currently being implemented, calls for immigration courts to appoint a pro bono liaison judge and, in courts of appropriate size and location, consider creating a pro bono committee.[42] Each pro bono liaison judge is charged with meeting regularly with local pro bono legal service providers to ensure continuing improvement in the level and quality of representation at the court.[43] Each pro bono liaison judge also facilitates communication between pro bono counsel and government attorneys, and consults with the EOIR LOP to strengthen the agency's public outreach.[44] In acknowledgment of the particular needs of pro bono representatives, the policy strongly encourages IJs "to be flexible with pro bono representatives, particularly in the scheduling of hearings and in the setting of filing deadlines."[45] And in recognition of the special circumstances that surround pro bono representation in immigration proceedings, the policy urges judges to "give pro bono representatives priority scheduling" for their cases, and to exhibit greater flexibility for law student representatives from law school clinics, as such representatives face greater constraints regarding staffing and preparation.[46]

3. Other Programs and Efforts

EOIR has established a Model Hearing Program, which provides immigration court training to attorneys and law students who commit to a minimum level of annual pro bono representation.[47] Volunteer IJs conduct mock trials focusing on practice, procedure, and advocacy skills. Participants may receive training materials and continuing legal education credit.[48]

Recognizing the special needs of children in immigration proceedings, the Office of Refugee Resettlement[49] ("ORR") has contracted with Vera to help procure pro bono legal representation for

---

36 *Id.*

37 *Id.*

38 *Id.*

39 News Release, U.S. Department of Justice, EOIR to Expand and Improve Pro Bono Programs 1 (Nov. 15, 2007), *available at* http://www.justice.gov/eoir/press/07/ProBonoEOIRExpandsImprove.pdf.

40 *Id.*

41 *See* U.S. Department of Justice, Operating Policies and Procedures Memorandum 08-01: Guidelines for Facilitating Pro Bono Legal Services (Mar. 10, 2008), *available at* http://www.usdoj.gov/eoir/efoia/ocij/oppm08/08-01.pdf.

42 *Id.* at 2-3.

43 *Id.* at 3.

44 *Id.*

45 *Id.*

46 *Id.* at 3-4. There also have been a variety of other efforts to increase the provision of pro bono legal services to noncitizens in immigration proceedings. For example, a number of lawyers from law firms, nonprofit groups, legal service providers, government, and academia have formed a Study Group, assembled by Judge Robert A. Katzmann of the U.S. Court of Appeals for the Second Circuit, to find ways to substantially increase the availability of competent pro bono counsel to provide representation in immigration matters. *See* Robert Katzmann, *Deepening the Legal Profession's Pro Bono Commitment to the Immigrant Poor,* 78 Fordham L. Rev. 453, 456 (2009), and other articles (including reports by three subcommittees of the Katzmann Study Group) in the same issue of the Fordham Law Review.

47 LOP Fact Sheet, *supra* note 28.

48 *Id.*

49 ORR operates under the aegis of the U.S. Department of Health and Human Services.

unaccompanied noncitizen children.[50] Currently, Vera staff oversee 14 nonprofit agencies that provide legal assistance to children in 12 cities.[51] In addition, EOIR administers the Unaccompanied Alien Children Initiative in coordination with certain NGOs and ORR.[52] Through this initiative, EOIR has established specific guidelines for IJs designed to create a child-friendly environment in the courtroom.[53]

III. Issues Relating to Representation

Despite the efforts outlined in Section II above, many noncitizens facing removal from the United States have inadequate or no legal representation, which compounds the challenges that the immigration adjudication system needs to resolve. This Section begins by describing some of the obstacles that prevent noncitizens from obtaining adequate counsel and then identifies some of the consequences for the noncitizen and for the adjudication system itself. In particular, lack of adequate representation diminishes the prospects of fair adjudication for the noncitizen, delays and raises the costs of proceedings, calls into question the fairness of a convoluted and complicated process, and exposes noncitizens to the risk of abuse and exploitation by unscrupulous "immigration consultants" and "notarios."

A. Scope of the Problem

The lack of legal representation for noncitizens is a significant problem. For example, in proceedings before the immigration courts, less than half of the noncitizens whose proceedings were completed in the last several years were represented. In 2008, approximately 57% of these noncitizens were unrepresented; in 2007, the figure was about 60%.[54] For those in detention, the figure is even higher — about 84% are unrepresented.[55] Rates of representation for proceedings before the BIA are somewhat better than for those before the immigration courts, but a substantial number of noncitizens are unrepresented here, as well: anywhere from 25% to 30% of cases completed by the BIA in the last five years involved an unrepresented noncitizen.[56] In 2008, only about 78% of such noncitizens were represented.[57]

B. Barriers to Access

There are multiple reasons why indigent noncitizens in immigration proceedings do not obtain much-needed counsel. LOP, which assists noncitizens in retaining pro bono counsel, is almost exclusively limited to detained persons.[58] In addition, it is only available at 25 of the approximately 350 detention facilities currently under contract with DHS.[59] While

50 Vera Institute of Justice, Unaccompanied Children Program, http://www.vera.org/project/unaccompanied-children-program (last visited Dec. 22, 2009).

51 *Id.* These agencies provide "Know Your Rights" orientations; provide individual screenings wherein staff meet individually with unaccompanied children to identify their legal needs and provide additional education about their rights and immigration law; provide pro bono assistance, including recruitment, training, and mentoring of pro bono attorneys who provide legal representation to children; and coordinate services by communicating with detention facility caseworkers, ORR staff, child welfare practitioners, and immigration authorities about unaccompanied children's needs and issues. *Id.*

52 LOP Fact Sheet, *supra* note 28, at 2.

53 U.S. Department of Justice Fact Sheet, Unaccompanied Alien Children in Immigration Proceedings (Apr. 22, 2008), *available at* http://www.usdoj.gov/eoir/press/08/UnaccompaniedAlienChildrenApr08.pdf. These guidelines include directives to establish special dockets for unaccompanied noncitizen children to keep them separate from the general population; allow child-friendly courtroom modifications; provide courtroom orientations to familiarize the children with the court; explain the proceedings to the unaccompanied child at the outset; prepare the child to testify; and employ child-sensitive questioning. The current guidelines are provided in Immigration Court Operating Policies and Procedures Memorandum 07-01, Guidelines For Immigration Court Cases Involving Unaccompanied Alien Children (May 22, 2007), *available at* http://www.usdoj.gov/eoir/efoia/ocij/oppm07/07-01.pdf.

54 EOIR, U.S. Dep't of Justice, FY 2008 Statistical Year Book G1 (Mar. 2009), *available at* http://www.justice.gov/eoir/statspub/fy08syb.pdf. For detailed information on representation rates, *see* Appendix A to this Section.

55 Improving Efficiency and Promoting Justice in the Immigration System: Lessons From the Legal Orientation Program 1 (May 2008), *available at* http://www.vera.org/download?file=1780/LOP%2Bevaluation_May2008_final.pdf.

56 Rights Working Group, Night of 1,000 Conversations: Detention and Due Process, http://www.nightof1000conversations.org/detention (last visited Dec. 22, 2009).

57 U.S. Department of Justice, FY 2008 Statistical Yearbook W1 (Mar. 2009).

58 The ABA Immigration Justice Project, with assistance from EOIR, currently operates a LOP for non-detained persons in the San Diego area.

59 U.S. Immigration and Customs Enforcement, "2009 Immigration Detention Reforms" (Aug. 6, 2009), *available at* http://www.ice.gov/pi/news/factsheets/2009_immigration_detention_reforms.htm.

there are a few public interest organizations at select locations that provide representation to noncitizens in immigration proceedings,[60] their number is small and they lack sufficient resources to service those without access to LOP. Thus, a large number of noncitizens in the immigration court system do not benefit from LOP or services provided by NGOs before being placed into immigration proceedings.

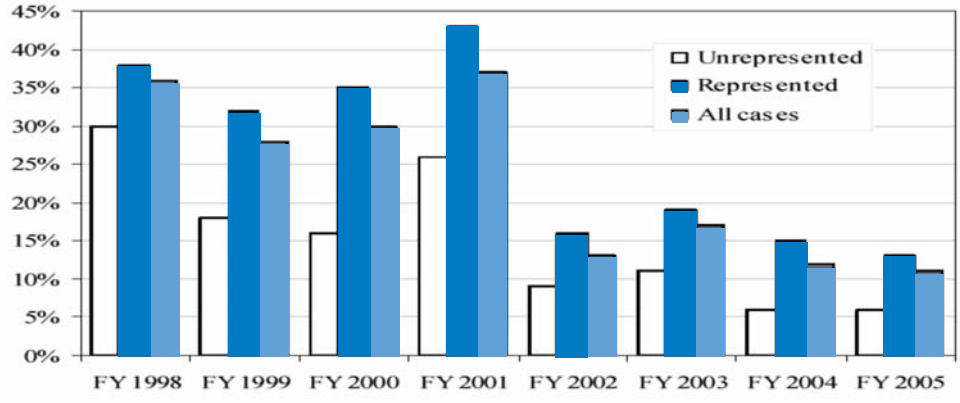
There are other reasons many fail to obtain representation. Many persons in immigration proceedings simply cannot afford an attorney or accredited representative. In addition, remote facilities, short visiting hours, restrictive telephone policies, and the practice of transferring detainees from one facility to another — often more remote — location without notice stand in the way of retaining counsel for many detainees.[61]

C. Consequences of Inadequate Representation

Represented noncitizens tend to fare better than those who navigate the process without assistance. GAO has estimated that representation generally doubles the likelihood of noncitizens being granted asylum.[62] For example, between 1995 and 2007, the grant rate for asylum applicants at the affirmative application stage with representation was 39% but only 12% for applicants without it.[63] And in defensive asylum cases, 27% of represented applicants were granted asylum, while only 8% of unrepresented applicants were successful.[64] Between 2000 and 2004, 25% of represented asylum seekers in expedited removal cases were granted relief, compared to only 2% of those who were unrepresented.[65]

Indeed, some argue that whether a noncitizen is represented may be the "single most important factor affecting the outcome of [an asylum] case."[66] For example, from January 2000 through August 2004, asylum seekers before the immigration courts were granted asylum 45.6% of the time when represented, compared to a 16.3% success rate when the asylee proceeded pro se.[67] And, as shown below, represented asylum applications achieve consistently higher success

Asylum Grant and Remand Rates, Including Representation[68]



60 *See* Charles H. Kuck, *Legal Assistance for Asylum Seekers in Expedited Removal: A Survey of Alternative Practices*, *in* 2 U.S. Commission on Int'l Religious Freedom Report on Asylum Seekers in Expedited Removal 239, 244-50 (2005), *available at* http://www.uscirf.gov/images/stories/pdf/asylum_seekers/ERS_RptVolII.pdf (describing the Florence Project at the Florence, Arizona ICE Service Processing Center; the Human Rights First Asylum Legal Representation Program in the New York and New Jersey area; and the Capital Area Immigrants' Rights Coalition in Arlington, Virginia — and restating the repeated complaint from such organizations that diminishing sources of available funding limit the services they can provide).

61 *See* Kerwin, *supra* note 5, at 3; *see also* Part 1: Department of Homeland Security, Section I, *supra*.

62 Gov't Accountability Office, Significant Variation Existed in Asylum Outcomes Across Immigration Courts and Judges 30 (2008) ("Gov't Accountability Office"). *See* U.S. Department of Justice, EOIR FY 2008 Statistical Year Book I1 (2008), *available at* http://www.usdoj.gov/eoir/statspub/fy08syb.pdf.

63 *Id*. at 30.

64 *Id*.. A defensive case involves an application for asylum made by a noncitizen who has been placed into removal proceedings by the government. Such applications are considered by IJs. *See* U.S. Department of Justice, *supra* note 54, at I1.

65 Kuck, *supra* note 60, at 239.

66 Ramji-Nogales *et al.*, *supra* note 1, at 340-41 (citing Kerwin, *supra* note 5, at 1).

67 *Id.*

68 *Id*. at 358-59, Fig. 43.

rates before the BIA than unrepresented applicants.

It appears that the availability of some form of competent, qualified representation is what matters most, not necessarily whether that person is a lawyer or non-lawyer or whether, if a lawyer, the person is an immigration practitioner or a less-experienced pro bono representative.[69] Representation by someone who is specially trained and accredited in immigration laws and procedures, and participates in good faith on behalf of the applicant, is beneficial in instances where an attorney is not available or affordable to a noncitizen. For example, one study indicated that most of the representatives from charitable organizations, even with less time and fewer resources than pro bono attorneys, were able to provide a high quality of representation.[70]

Unqualified representatives, on the other hand, can create problems. There are examples of individuals who take advantage of persons seeking assistance for immigration matters. These persons go by a variety of titles, but are commonly referred to as "visa consultants," "immigration consultants," or "notarios" (collectively referred to as "notarios" in common parlance).[71] These individuals are not permitted to represent noncitizens before immigration courts or the BIA.[72] Several states have attempted to regulate them.[73] Nevertheless, notarios are ubiquitous in noncitizen communities and routinely offer promises of legal advice and assistance that they are sometimes unqualified to give.[74] According to many reports, notarios defraud tens of thousands of noncitizens every year.[75]

These actions are costly not only to the clients of notarios but also to the immigration system as a whole. Some notarios submit false or incomplete information in immigration proceedings, and as a consequence immigration administrators and courts waste time that could be spent adjudicating meritorious cases ferreting out these applications.[76]

Noncitizens with inadequate or no representation also have difficulty understanding and mastering the complexity of America's immigration laws and adjudication system. Because of a lack of information and resources, many unrepresented noncitizens in the immigration adjudication system are unable to determine what, if any, relief is available to them or to otherwise navigate our immigration adjudication system effectively. Without assistance, the efficiency of proceedings is significantly damaged as noncitizens do not have competent counsel to help prepare testimony, assemble documents, and conduct legal research. As noted above, this appears to impact a noncitizen's success in the system since those noncitizens proceeding with counsel have a much higher success rate than those without representation.

IV. Recommendations Relating to Representation

Several steps should be taken to address the obstacles noncitizens face in obtaining competent representation. First, a right to representation at government expense should be recognized (1) in removal proceedings for indigent noncitizens who are potentially eligible for relief from removal and cannot otherwise obtain legal counsel; and (2) for all unaccompanied minors and persons with mental disabilities and illnesses, whether or not they are placed

69 *See generally id.* at 340-41 (stating that law students in Georgetown University's clinical program from January 2000 to August 2004 won asylum for their clients at an 89 percent rate in immigration court, and that cases taken on by pro bono attorneys from large law firms yielded a 96 percent success rate in cases handled to conclusion during that same period).

70 Andrew I. Schoenholtz & Jonathan Jacobs, *The State of Asylum Representation: Ideas for Change*, 16 GEO. IMMIGR. L.J. 739, 758 (2002) (*citing* Felinda Mottino, *Moving Forward: The Role of Legal Counsel in Immigration Court* (Vera Institute of Justice, July 2000)).

71 *See* Andrew F. Moore, *Fraud, the Unauthorized Practice of Law and Unmet Needs: A Look at State Laws Regulating Immigration Assistants*, 19 GEO. IMMIGR. L.J. 1, 2 (2004).

72 NOTICE, EOIR, "NOTARIOS," VISA CONSULTANTS, AND IMMIGRATION CONSULTANTS ARE NOT ATTORNEYS (Nov. 20, 2008), *available at* http://www.usdoj.gov/eoir/press/08/ NotariosNoticeProtectionsCAFINAL112008.pdf; *see generally* EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, IMMIGRATION COURT PRACTICE MANUAL, *supra* note 24, at 28.

73 *See generally* Moore, *supra* note 71, at 11-15 (discussing legislative provisions regulating non-attorney service providers in several states, including California, Michigan, New York, Washington, Illinois, Minnesota, and New Jersey).

74 *Id*. at 2.

75 *Id.* at 3 (citing Edwin Garcia, *Activists Help Those Who Fall Through the Cracks*, SAN JOSE MERCURY NEWS, Aug. 25, 2003, at 1A). *See also* Careen Shannon, *Regulating Immigration Legal Service Providers: Inadequate Representation and Notario Fraud*, 78 FORDHAM L. REV. 577 (2009) (proposing changes to local, state, and federal law and policy to prevent fraudulent activities by notarios and others providing legal services to indigent noncitizens).

76 *Id.* at 6 (using as an example a case in California where an immigration consultant used the same information for hundreds of applications. Not only were all of the applicants who signed these false papers subject to perjury laws and faced the prospect of removal, but the agency charged with reviewing and detecting the false information wasted precious time and resources).

in formal removal proceedings. Second, steps should be taken to expand LOP in order to reach, wherever possible, all noncitizens in adversarial immigration proceedings where there is a risk of removal. Third, this expanded LOP should incorporate a screening process that would identify those noncitizens (including unaccompanied minors and persons with mental disabilities or illnesses) who need representation and provide, where necessary, counsel or other representatives for those qualifying noncitizens. As discussed below, such a plan will require funding for counsel and accredited representatives.

Ensuring access to qualified representation is not only important for the sake of noncitizens in urgent need of legal counsel. Adequate legal representation is a hallmark of a just system of law, and this is no less true in the context of immigration proceedings. Accordingly, addressing the representation crisis will help restore legitimacy to the immigration adjudication system. In fact, as a number of immigration educators, judges, practitioners, and government officials surveyed for this Study have observed, the presence of competent, well-prepared counsel on behalf of both parties helps to clarify the legal issues and allows courts to make more principled and better-informed decisions. Moreover, representation for indigent noncitizens would ameliorate the legal errors associated with pro se litigants. Increased representation for indigent noncitizens would also lessen the burden on immigration courts and facilitate smoother processing of claims. As discussed in Section III, *supra*, pro se litigants can cause delays in the adjudication of their cases and, as a result, impose a substantial financial cost on the government. In addition, a lawyer can help a noncitizen understand and effectively navigate the complexities of the U.S. immigration system, a process that can be especially daunting and difficult where language and cultural barriers are present. Thus, enhancing access to quality representation promises greater institutional legitimacy, smoother proceedings for courts, reduced costs to government associated with pro se litigants, and more just outcomes for noncitizens.

A. Implement a Right to Representation

1. Recognize a Right to Representation in Certain Cases

Congress should enact a statute granting an indigent noncitizen a right to representation in certain circumstances.[77] The right should extend to removal proceedings where a noncitizen has potential relief from removal and cannot afford legal counsel. Such proceedings include any adjudication before an IJ, as well as instances where a noncitizen challenges his or her placement in expedited removal through a *habeas* petition. The ABA has previously stated its support for extending a right of representation to noncitizens in removal proceedings who are potentially eligible for relief from removal.[78]

Congress and the administration also should act to ensure that legal representation, including government-appointed counsel, is provided to noncitizens who are unaccompanied minors and persons with mental disabilities and illnesses in any immigration proceeding, whether or not the proceeding may necessarily lead to removal.[79] The ABA has previously expressed its view that Congress and the administration should take actions to ensure that unaccompanied children and noncitizens with mental illnesses or disabilities receive legal representation.[80]

---

77 A noncitizen should have a right to representation for certain types of claims, regardless of whether such right is grounded in the Constitution or by a newly created statute. Various commentators have argued that the right to representation enshrined in the U.S. Constitution should not be narrowly reserved for criminal trials, noting that immigration proceedings, after all, commonly carry consequences as significant as (and sometimes worse than) a loss of liberty. *See* John R. Mills et al., *"Death is Different" and a Refugee's Right to Counsel* (Cornell Legal Stud. Res. Paper No. 1290382, Jan. 13, 2009), *available at* http://ssrn.com/abstract=1290382 (last visited June 4, 2009) (comparing death penalty cases to those in which a noncitizen faces persecution and death if removed, and arguing that such noncitizens have a due process right to counsel). Moreover, the provision of government-funded attorneys in analogous federal adversarial proceedings supports arguments for the same here. A civil due process right to representation has been recognized in juvenile delinquency and civil commitment proceedings, as well as in probation revocation and parental termination matters. Federal statutory law also recognizes a right to counsel in child abuse and neglect cases under the Child Abuse Prevention and Treatment Act. 45 C.F.R. § 1340.14(g). In addition, the federal "*in forma pauperis*" regulation authorizes a court to appoint counsel to represent an indigent in any civil case. 28 C.F.R. § 1915(e)(1).

78 ENSURING FAIRNESS, *supra* note 6, at 2.

79 As the ABA points out in ENSURING FAIRNESS, *supra* note 6, the law calls for the government to ensure that unaccompanied children have legal representation in immigration proceedings and other matters, but only "to the extent practicable," and does not require the appointment of a guardian or advocate. And the ABA notes that for those who are mentally ill or disabled, the law allows an attorney or other representative to appear on behalf of the respondent, but does not require that legal representation be provided. *Id.*

80 *Id.*

Depending on the nature of the proceeding, a noncitizen could be represented by an attorney or a second level accredited non-attorney representative.[81] Representation by attorneys should be required in proceedings raising substantial questions of law, such as appeals to the BIA where a significant legal issue is presented, all appeals to the federal appellate courts, and in the preparation of habeas petitions for those challenging an expedited removal order. In other instances, such as adjudications in front of an IJ, in addition to attorneys, a second level accredited representative would continue to be able to represent a noncitizen, as is presently allowed under the regulations.[82] Second level accredited representatives have full accreditation, which requires a higher level of experience than first level or partial accreditation.[83]

An indigent's right to government-funded counsel would extend to all levels in the immigration adjudication process, including appellate proceedings before the BIA and the courts of appeals.[84] As the Supreme Court has noted in the context of criminal appeals, providing an indigent appellant an attorney for appeals prevents the right of appeal from being little more than a "meaningless ritual."[85]

2. Extend the Reach of the Legal Orientation Program

As stated above, EOIR established LOP in 2003 to assist detained individuals in removal proceedings.[86] This program provides individuals with information regarding basic immigration law and procedure before immigration courts.[87] LOP also provides its participants with general legal and procedural instruction, the opportunity to receive legal information relevant to his or her case from a knowledgeable legal service provider in an individual orientation and, depending on the person's potential grounds for relief, a referral for pro bono counsel, self-help legal materials, and a list of free legal service providers organized by state.[88] This last aspect of LOP provides a critical link between those who need representation and those willing to provide it.

However, LOP, as currently implemented, does not reach the majority of noncitizens. First, it does not reach all noncitizens who are detained, sometimes for many months. Second, it does not reach non-detained noncitizens who might have special needs, such as unaccompanied minors and persons with mental disabilities or illnesses. Third, it may not be able to reach those noncitizens who are placed into expedited removal, a practice that is increasingly prevalent.[89]

The expansion of the number of detainees has outpaced the expansion of funding for LOP. As such, the number of people receiving LOP services represents a shrinking percentage of the overall detained population. Further, LOP is only available at 25 of the approximately 350 jails or detention facilities currently under contract with DHS.[90] DHS estimates that in fiscal year 2009, 442,941 noncitizens will be detained in ICE custody.[91] Of those, LOP expects to reach about

---

81 *See* Section II.B, *supra*; *see also* Section III.C, *supra,* discussing notarios.

82 8 C.F.R. § 1292.4(a).

83 *See* Tim McIlmail, Board of Immigration Appeals Accreditation and Entering Immigration Appearances: A Checklist Guide to 8 C.F.R. § 292 (3d ed. 1994).

84 *See* Part 4: Judicial Review, Section II.2, *supra* (discussing the current jurisdiction of the courts of appeals to review final decisions from the BIA).

85 *See* Evitts v. Lucey, 469 U.S. 387, 393-97 (1985).

86 *See* LOP Fact Sheet, *supra* note 28. *See also* LOP Website, *supra* note 28.

87 LOP Fact Sheet, *supra* note 28, at 1.

88 The list of free legal service providers is available on request from EOIR, or online on the EOIR website, http://www.usdoj.gov/eoir/probono/states.htm (last visited Dec. 22, 2009).

89 *See, e.g.*, Department of Homeland Security, Annual Report: Immigration Enforcement Actions: 2008 3 (July 2009), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_08.pdf (noting a 12 percent increase in expedited removals in 2008 as compared to 2007); *see also* Press Release, Department of Homeland Security, DHS Expands Expedited Removal Authority Along Southwest Border (Sept. 14, 2005), *available at* http://www.dhs.gov/xnews/releases/press_release_0750.shtm (announcing the expansion of expedited removal authority from 3 to 9 CBP Border Patrol Sectors).

90 2009 Immigration Detention Reforms, *supra* note 59.

91 *Medical Care and Treatment of Immigration Detainees and Deaths in DRO Custody: Hearing Before the House Appropriations Comm. Subcomm. on Homeland Security*, 111th Cong. 3 (2009) (statement of James T. Hayes, Jr., Director, Office of Detention and Removal Operations)

58,000, or 13%.[92] This group includes noncitizens who are particularly vulnerable, such as persons with mental disabilities or illnesses. If members of these vulnerable groups, as well as noncitizens potentially eligible for relief from removal, had access to the resources provided by LOP, this would help reach a sizable population who needs assistance.

Finally, LOP is focused mainly on removal proceedings before IJs. LOP, or some abbreviated version of the program, should be made available to reach those detained while awaiting credible fear interviews.

Accordingly, efforts should be made to establish LOP at all detention sites and at immigration courts for non-detained noncitizens in removal proceedings.[93] The expansion of LOP to all detention sites will enable those placed in detention while awaiting a credible fear interview or after being placed in expedited removal the ability to access those portions of LOP that link those in need to representation.[94]

In addition to greater funding, coordination with Immigration and Customs Enforcement ("ICE") is required for LOP expansion. On August 6, 2009, ICE announced plans for a "major overhaul" of the agency's immigration detention system.[95] This overhaul includes the creation of an Office of Detention Policy and Planning ("ODPP") which will, among other things, evaluate the best location, design, and operation of ICE detention facilities.[96] In its announcement, ICE noted its plans to move, over the next three to five years, away from the present decentralized, jail-oriented approach to a civil detention system.[97] ODPP should incorporate LOP, as modified as described herein, at all of the detention centers in this new system.[98]

3. Implement a Legal Orientation Program Screening Process

LOP's current screening system should be modified to incorporate a system that will screen indigent persons in removal proceedings who are potentially eligible for relief and refer them to individuals or groups who can represent them in adversarial proceedings. The system would also screen

---

92 Interview with Oren Root, Director, Center on Immigration and Justice, Vera Institute of Justice (estimating that Vera currently averages "somewhat over 4,600 participants per month").

93 The ABA has previously recommended that Congress provide increased funding to expand LOP nationwide to all detained and non-detained persons in removal proceedings. *See* ENSURING FAIRNESS, *supra* note 6, at 4.

94 It may be logistically difficult to extend LOP to noncitizens awaiting a credible fear interview or before they are placed in expedited removal (i.e., during initial inspection interviews). Moreover, the extension of LOP to those in the expedited removal process will present significant challenges under existing law. As stated in the report issued by the United States Commission on International Religious Freedom, *supra* note 60, at 238, the expedited removal process is one in which the noncitizens have no right to an attorney. The report provides the following summary: "[t]he alien may neither contact nor be represented by an attorney or other representative before or during the Expedited Removal process at the port of entry. If the inspector refers the alien for a credible fear determination, the alien may contact an attorney or representative during the minimum 48 hour period between the inspection process at the port of entry ('POE') and the credible fear interview. The alien must do so, however from the facility where he has been placed in mandatory detention." *Id.* at 237. During the credible fear interview, counsel may not advocate for the noncitizen, though an attorney or representative may observe the interview and may, in the discretion of the hearing officer, be permitted to present a statement at the end. 8 C.F.R. § 208.30(d)(4). While a record of the questioning by the CBP Inspector — consisting of the sworn statement of the noncitizen prepared by the inspector — is included in the noncitizen's file, such questioning is not usually taped or independently transcribed. 8 C.F.R. §1235.3(b)(2) (2003). The report also notes: "While an alien/asylum-seeker may consult with persons of his choice prior to the credible fear interview, there is no right to 'representation,' nor does the alien have the right to have counsel present at the immigration judge's review of the negative credible fear determination. Not until after the alien/asylum-seeker is found to have a credible fear of persecution or torture (after a credible fear interview), may an attorney fully represent him or her at an asylum hearing before an immigration judge. While an alien/asylum seeker will not have access to counsel at the primary or secondary inspection process, or likely not even at the credible fear determination, the alien is asked to sign legal documents which will have a bearing on a subsequent claim for asylum." Kuck, *supra* note 60, at 238. Thus, the expedited removal process creates numerous barriers to representation for noncitizens and asylum seekers.

95 Press Release, U.S. Immigration and Customs Enforcement, ICE Announces Major Reforms to Immigration Detention System (Aug. 6, 2009), *available at* http://www.ice.gov/pi/nr/0908/090806washington.htm.

96 *Id.*

97 2009 IMMIGRATION DETENTION REFORMS, *supra* note 59.

98 *Id.*

all noncitizens to determine whether they belong to one of several vulnerable populations entitled to representation. At a minimum, this population would include unaccompanied minors[99] and those with mental illnesses or disabilities.[100] This list of vulnerable populations might be expanded to include other indigent vulnerable populations that are in removal proceedings, including, for example, battered women or the physically disabled. Under such a system, qualifying cases could be referred to charitable legal programs or pro bono counsel. Where these services are unavailable, government-paid counsel would be appointed.[101] Such a screening process would help ensure that noncitizens get the representatives they need.[102]

The screening process would also help ensure that only those noncitizens with qualifying cases would obtain representation at government expense. The precise standards for selecting those cases that merit counsel would be developed by EOIR. Accordingly, the screening process would identify those indigent noncitizens with qualifying cases who cannot afford representation. Those with cases that do not merit government-funded counsel will still be provided with LOP's "other services" which, as described above, include resources that facilitate hiring available counsel.

4. Source of Representatives

The enhanced LOP would require the creation of an administrative structure to provide counsel, at government expense, to indigent noncitizens in removal proceedings who are potentially eligible for relief from removal and cannot otherwise obtain counsel and those who are unaccompanied minors or suffer mental disabilities or illnesses.[103] Among other potential models, the structure could be modeled on the federal public defender system.[104] Under such a model, an LOP administrative panel would screen all noncitizens in removal cases to determine whether they meet the thresholds for counsel described above. The screening panel would then have the option of appointing government-funded attorneys to those meeting such thresholds, or sending cases to appointed

---

99 LOP currently does not serve unaccompanied minors. Instead, they are assisted by ORR's Division of Unaccompanied Children Access to Legal Services Project ("Project"). *See* discussion at Section II.C.3, *supra*; *see also* ORR Unaccompanied Children's Services, *at* http://www.acf.hhs.gov/programs/orr/ programs/unaccompanied_alien_children.htm; ORR Programs For Vulnerable And Unaccompanied Children, *at* http://icpc.aphsa.org/home/Doc/KelleyICPCReviewingPractices.pdf. In order to ensure that all unaccompanied minors obtain access to counsel, LOP, as described herein, should be made a part of this Project or the Project should be coordinated with LOP.

100 The ABA has previously expressed its view that Congress and the administration should take actions to ensure that unaccompanied minors and mentally ill and disabled persons are always provided counsel. ENSURING FAIRNESS, *supra* note 6, at 2 (proposing a screening system to identify indigent noncitizens potentially eligible for relief from removal). *Id*. at 2-3. *See also* ABA COMMISSION ON IMMIGRATION, REPORT TO THE HOUSE OF DELEGATES, RECOMMENDATION 9 (2006), *available at* http://www.abanet.org/publicserv/immigration/107a_right_to_counsel.pdf (supporting "legal representation for mentally ill and disabled persons for the duration of their cases").

101 ABA COMMISSION ON IMMIGRATION, REPORT TO THE HOUSE OF DELEGATES, RECOMMENDATION, *supra* note 100, at 9-10; *see also* Section IV, *infra* (discussing the expansion of LOP and other pro bono programs).

102 The ABA has previously stated that "[t]o ensure due process and the effective administration of justice, all indigent noncitizens in removal proceedings should be screened by lawyers or other highly trained experts supervised by lawyers." ENSURING FAIRNESS, *supra* note 6, at 2 (ABA proposed screening system to identify "indigent noncitizens with potential relief from removal"). There are several public interest groups that provide screening services that might serve as the starting point for a government-funded model. One successful example is the Immigration Representation Project ("IRP") in New York City that helps indigent noncitizens find attorneys. Kerwin, *supra* note 5, at 13. Under the IRP, IJs and service organizations refer non-detained and detained unrepresented noncitizens to screening sessions at participating non-profit agencies, which provide attorneys on a rotating basis to interview all referred clients. Income-eligible clients with potential claims are referred to agencies for representation or to pro bono attorneys. The IRP also provides training to private attorneys who in exchange promise to provide pro bono representation in at least one IRP case. The IRP also serves detained noncitizens, screening detainees each week.

103 Specifically, the right to counsel would attach in adversarial immigration proceedings, such as a hearing before an IJ. *See* Section IV.A.1, *supra*.

104 The federal public defender system provides for representation by full-time salaried public defenders, as well as the appointment of private counsel at state expense. In the federal public defender system, each U.S. district court develops a plan for providing legal representation and related services for financially eligible persons. 18 U.S.C. § 3006A(a)(2)(A) (2008). The court plan must include the appointment of private attorneys, attorneys from a bar association or legal aid agency, and/or a defender organization. 18 U.S.C. § 3006A(a)(3). In districts or parts of districts in which at least 200 persons require appointed counsel each year, defender organizations can be established. 18 U.S.C. § 3006A(g)(1). The court of appeals for the circuit appoints a federal public defender who oversees the work of salaried attorneys. 18 U.S.C. § 3006A(g)(2)(A). Appointed counsel are selected from a panel approved by the court, or from a bar association, legal aid agency, or defender organization. 18 U.S.C. § 3006A(b).

or contract attorneys, accredited representatives, or pro bono organizations.[105] Defender organizations could be established for the various "high volume" detention centers. In order to qualify for appointment, private attorneys would have to meet certain requirements to ensure their qualifications and competence in immigration law. Second level accredited representatives would have to meet and maintain existing standards for accreditation. Paid representatives would be particularly critical in geographic areas where pro bono and legal aid organizations are minimal or nonexistent. Regional public defenders would be appointed to oversee the work of salaried attorneys and to assess the ongoing performance of appointed private counsel and second level accredited representatives.

5. Expense to the Government of Representation

The cost of providing representation to indigent noncitizens under the public defender model described above is likely to be significant, but not unreasonably so.[106] As noted above, in 2008, approximately 57% of noncitizens, or approximately 168,810, were unrepresented before the immigration courts, and about 78% of cases completed by the BIA involved an unrepresented noncitizen. Indigent noncitizens with potential claims of relief from removal, noncitizens who are unaccompanied minors, or noncitizens who suffer mental disabilities or illnesses, however, are a subset of these noncitizens. DOJ statistics estimate that only 10% of those who receive LOP presentations have "viable" claims for relief.[107] Assuming this 10% figure is correct, approximately 17,660 noncitizens appearing before the immigration courts or BIA annually, plus the unaccompanied minors and those suffering from mental disabilities or illness who would be entitled to representation regardless of the viability of their claims, would potentially be eligible for government-funded representation.[108] Not all of these noncitizens will be entitled to representation since they may not meet income requirements and may not be unaccompanied minors or suffer mental illnesses or disabilities.

The cost of representing indigent noncitizens will also depend on whether they are represented by government attorneys or private attorneys and second level accredited representatives paid for by the government. Assuming private attorneys are used, based on a small sample of urban and rural areas across the country, it appears that the typical hourly rate paid to private attorneys by state or county defender programs ranges from $60 to $125, depending on the type of matter.[109] In federal criminal proceedings,

---

105 Currently, an organization which receives funding from the Legal Services Corporation ("LSC") may only use its funds to represent citizens, lawful permanent residents, refugees, and a few other groups of noncitizens. The ABA has previously recommended that organizations which receive funding from the LSC should not be restricted in using these funds to aid noncitizens who would otherwise qualify for assistance, but are currently disqualified because of their citizenship status. ENSURING FAIRNESS, *supra* note 6, at 3.

106 In order to limit controversy over whether the provision of government-funded representation is permitted under current law, legislative action should eliminate the "no expense to the government" limitation of Section 292 of the INA. The ABA has previously recommended that Congress repeal the restriction. ENSURING FAIRNESS, *supra* note 6, at 2. The former Immigration and Naturalization Service ("INS") interpreted the clause to preclude the government from paying the salaries of persons representing aliens. *See* Kerwin, *supra* note 5, at 7 (citing INS OFFICE OF GEN. COUNSEL, FUNDING OF A PILOT PROJECT FOR THE REPRESENTATION OF ALIENS IN IMMIGRATION PROCEEDINGS (Dec. 21, 1995)). Others, however, disagree with the INS's interpretation of the law. *See* PETITION FOR RULEMAKING, *supra* note 6, at 6-8.

107 ENSURING FAIRNESS, *supra* note 6, at 2.

108 For purposes of this Study, we are assuming that the DOJ's definition of a "viable" claim would encompass all noncitizens who are potentially eligible for relief from removal. If the DOJ's definition would not encompass all such noncitizens, the number of noncitizens who would be eligible for representation may be higher.

109 We reviewed rates in both urban and rural areas. *See, e.g.,* SAN MATEO COUNTY BAR ASSOCIATION, ATTORNEYS' FEES, http://www.smcba.org/index.php?option=com_content&task=view&id=25&Itemid=82 (last visited Dec. 22, 2009) (San Mateo County, California pays private counsel appointed to represent indigent criminal defendants a basic case fee, plus $65 an hour for an appearance at a pre-trial conference and $90 an hour for a jury trial); Matt Gonalez & Whitney Leigh, *Defending the Public Defender*, FOG CITY JOURNAL, July 8, 2009, *available at* http://sfpublicdefender.org/media/2009/07/defending-public-defender/ (private attorneys who handle cases for the Public Defender's office in San Francisco when there is a conflict charge between $85-$125 an hour); OFFICE OF THE CHIEF JUSTICE, SUPREME COURT OF COLORADO, APPOINTMENT OF STATE-FUNDED COUNSEL IN CRIMINAL AND JUVENILE DELINQUENCY CASES AND FOR CONTEMPT OF COURT (July 2009), *available at* http://www.courts.state.co.us/Courts/Supreme_Court/Directives/CJD%2004-04%20Amended%206-09.pdf (appointed private defense counsel in Colorado are paid $68 an hour to represent defendants charged with a Class A felony and $65 an hour to represent defendants charged with other criminal offenses); MONROE COUNTY CONFLICT DEFENDER OFFICE, ASSIGNED COUNSEL RATE INCREASE (Dec. 3, 2003), *available at* http://www.mcacp.org/new_rates_2.pdf (Monroe County, New York pays appointed private counsel $60 to $75 an hour, depending on the type of matter); COUNTY OF GALVESTON, TEXAS FAIR DEFENSE ACT — GALVESTON COUNTY PLAN (Oct. 1, 2007), *available at* http://www.co.galveston.tx.us/
justice_center/documents/GC0A.pdf (Galveston County, Texas pays appointed private defense counsel $65 an hour)

private attorneys who represent indigent defendants are paid $110 per hour in non-capital cases.[110]

A business consulting firm hired by Kids In Need of Defense ("KIND") estimated that attorneys spend, on average, 50 hours per case when representing unaccompanied minors in immigration proceedings.[111] Assuming a private attorney is provided to the estimated 17,660 noncitizens with viable claims at an average of 50 hours per claim and a rate of between $60 and $125 per hour, the approximate cost of providing representation each year would be between $52,950,000 and $110,375,000.

These figures, however, are likely to overstate the cost for a number of reasons. First, not all of the estimated 17,660 unrepresented noncitizens with viable claims will be entitled to representation. Some will not be eligible because they do not meet the financial and other screening criteria.

Second, not all noncitizens will be represented by private counsel. As noted above, we recommend that second level accredited representatives be used where appropriate. These representatives are likely to cost less than private attorneys. Moreover, it is possible that the costs would be lower if government attorneys, rather than private attorneys, were used to provide such representation.

Finally, the cost of appointed representation will likely be offset by savings to the government in the form of reduced detention costs.[112] For instance, detainees who are seeking pro bono counsel are often granted a continuance, or multiple continuances, to find an attorney.[113] Moreover, where detainees proceed pro se, an IJ must advise them of all of their rights.[114] With the cost of immigration detention averaging around $95 a day, a delay of only two weeks could cost the government more than $1,000.[115]

There is a range of variables that must be taken into account in determining the costs of providing representation. Further study and analysis of this issue is needed.

B. Improve Quality of Representation

1. Punish Attorneys Who Do Not Meet the Code of Conduct

a. Allow for Contempt Authority

The Department of Justice has recognized the need for IJs to be able to "control their courtrooms and protect the adjudicatory system from fraud and abuse."[116] The Rules of Conduct could be amended to allow for civil money penalty contempt authority.[117] This authority is currently enabled by legislation albeit not yet implemented by regulation.[118] Contempt authority was specifically listed in the Attorney General's 2006 Directives,[119] but was not implemented in the amended rules. Although the contempt authority has existed since 1996, the Attorney General has not implemented it because DHS (and previously INS) has continually "objected to having its attorneys subjected to contempt provisions by other attorneys within the Department,

---

110 Administrative Office of the U.S. Courts on behalf of the U.S. Courts, The Defender Services Program, http://www.uscourts.gov/defenderservices/history.html (last visited Dec. 22, 2009).

111 *See* Press Release, Microsoft, KIND Announcement (Oct. 17, 2008), *available at* http://www.microsoft.com/presspass/exec/bradsmith/10-17kind.mspx. KIND represents unaccompanied minors who have been separated from their families in immigration proceedings. *See* KIND, Children Alone, http://www.supportkind.org/ (last visited Dec. 22, 2009).

112 Petition for Rulemaking, *supra* note 6, at 12-13.

113 *Id.*

114 *Id.*

115 *Id.*

116 73 Fed. Reg. at 76,915.

117 *Promises Not Kept: Failures in Implementing Key Immigration Court Reforms: Hearing Before the House Subcomm. on Immigration, Citizenship, Refugees, Border Security, and Int'l Law of the House Judiciary Comm.*, 110th Cong. 8 (Sept. 23, 2008) (statement of Susan B. Long, Co-Director, Transaction Records Access Clearinghouse), *available at* http://trac.syr.edu/immigration/reports/199/23Sep08Statement_TRAC_Susan_B_Long.pdf.

118 *See* 8 U.S.C. § 1229a(b)(1) ("The immigration judge shall have authority (under regulations prescribed by the Attorney General) to sanction by civil money penalty any action (or inaction) in contempt of the judge's proper exercise of authority under this chapter.")

119 *See* Office of the Attorney General, Measures to Improve the Immigration Courts and the Board of Immigration Appeals 5 (Aug. 9, 2006), *available at* http://www.usdoj.gov/ag/readingroom/ag-080906.pdf ("The Director of EOIR . . . will draft a new proposed rule that creates a strictly defined and clearly delineated authority to sanction by civil money penalty an action (or inaction) in contempt of an immigration judge's proper exercise of authority.") ("Attorney General's 2006 Directives").

even if they do serve as judges."[120] Contempt authority could provide IJs "with an important tool to enforce [DHS] compliance with its orders"[121] and empower judges to "meaningfully sanction attorneys for contemptuous behavior, such as late filings or ignoring judicial orders, that slows down the court and makes just adjudications more difficult."[122]

b. Strictly Enforce Prohibitions Against the Unauthorized Practice of Law

The Attorney General's 2006 Directives also recognized the need to detect and report fraud and abuse by unqualified and/or dishonest persons who accept payment in return for purported legal representation in immigration proceedings.[123] According to the DOJ, EOIR has established a Fraud Program, appointed an anti-fraud officer to identify fraud and coordinate interagency responses, and trained immigration court and BIA staff about the program.[124] Courts and immigration officials should continue to follow the Fraud Program guidelines and monitor immigration cases for indications that fraudulent operators are at work and should prosecute them to the full extent of the law. The ABA has cited the need for strict enforcement of legal prohibitions against the unauthorized practice of law, and for mechanisms to ensure that noncitizens are not deprived of substantive and procedural rights as a consequence of the unauthorized practice of law.[125]

2. Promote Efforts to Expand Sources of Representatives

a. Increase the Number of Agencies Recognized by the BIA and Allow Them to Charge More Than a Nominal Fee

As noted above in Section II.B, persons entitled to represent individuals in matters before DHS and the immigration courts and BIA include, among others, accredited representatives. Nationwide, there are currently fewer than 750 recognized agencies, fewer than 900 accredited representatives, and an even smaller number of "second level" fully accredited representatives, who are available to represent noncitizens including the approximately 440,000[126] persons detained by ICE annually.[127] Part of the problem may be that the regulations allow recognized agencies to charge only a "nominal" fee for their assistance. Such fees may not be sufficient to maintain the financial viability of those organizations and may contribute to the shortage of agencies recognized by the BIA and accredited representatives.[128] A possible solution is for 8 C.F.R. § 292.2 to be amended to allow a nonprofit agency to be recognized where it accepts "reasonable and appropriate fees," for the services its trained representatives provide, as opposed to "nominal charges" now permitted. It would also be important to monitor accredited representatives periodically to ensure continuing compliance with all applicable requirements.

---

120 Nat'l Ass'n of Immigration Judges, An Independent Immigration Court: An Idea Whose Time Has Come 9 (2002), *available at* http://www.woodrow.org/teachers/esi/2002/CivilLiberties/ Projects/PositionPaperImmigrationJudges.pdf.

121 *Immigration Reform and the Reorganization of Homeland Defense: Hearing Before the Subcomm. on Immigration, Border Security and Citizenship of the S. Judiciary Comm.*, 104th Cong. (2002) (testimony of Hon. Dana Marks Keener, President, NAIJ).

122 Statement of Susan B. Long, *supra* note 117, at 6.

123 *See* Attorney General's 2006 Directives, *supra* note 119 at 7.

124 U.S. Department of Justice, EOIR's Improvement Measures — Progress Overview, Sept. 8, 2008, at 7, *available at* http://www.usdoj.gov/eoir/press/08/EOIRs22ImprovementsProgressOverview090508v2.pdf.

125 *See* ABA, House Resolution 107D (Feb. 13, 2006).

126 *Medical Care and Treatment of Immigration Detainees and Deaths in DRO Custody: Hearing Before the House Appropriations Comm. Subcomm. on Homeland Security*, 111th Cong. 3 (2009) (statement of James T. Hayes, Jr., Director, Office of Detention and Removal Operations).

127 *See* EOIR, U.S. Dep't of Justice, Recognition and Accreditation Roster, http://www.usdoj.gov/eoir/statspub/raroster.htm (last visited Dec. 22, 2009).

128 *See* Kerwin, *supra* note 5, at 15.

b. Improve Resources for Pro Se Litigants

For noncitizens who do not obtain representation, EOIR could publish, in multiple languages, a stand-alone pro se litigant guide to asylum and the immigration courts. At least one federal court already provides such stand-alone pro se guidelines related to appeals of a final order of removal.[129] This pro se guide could be distributed by court clerks, charitable organizations involved in immigration matters, community organizations, pro bono projects, and churches. DHS and EOIR should make sure that every detention facility provides such guides.

c. Expand Pro Bono

As noted above, EOIR has supported the appointment of a pro bono liaison judge and the creation of a pro bono committee at various immigration courts. These liaison judges meet regularly with local pro bono legal service providers to ensure continuing improvement in the level and quality of representation at the court, facilitate communication between pro bono counsel and government attorneys, and consult with the LOP to strengthen the agency's public outreach. This program should be expanded and improved to facilitate and encourage attorney participation.

d. Continue Efforts to Maximize Usefulness of the Pro Bono Service Providers List

As stated above, EOIR maintains a roster of pro bono service providers, updated quarterly, and is required under statute and regulation to provide this list to all individuals in removal proceedings. Updated and properly maintained, the list provides an invaluable source of assistance for noncitizens facing removal. EOIR has announced plans to develop regulations to strengthen the requirements for attorneys and organizations who wish to be included on this list.[130] Appropriate regulations should be adopted promptly that facilitate the process of connecting noncitizens to competent counsel. At a minimum, immigration judges should be required to consult with local bar associations and other local stakeholders in determining the criteria for inclusion on the pro bono service providers list.

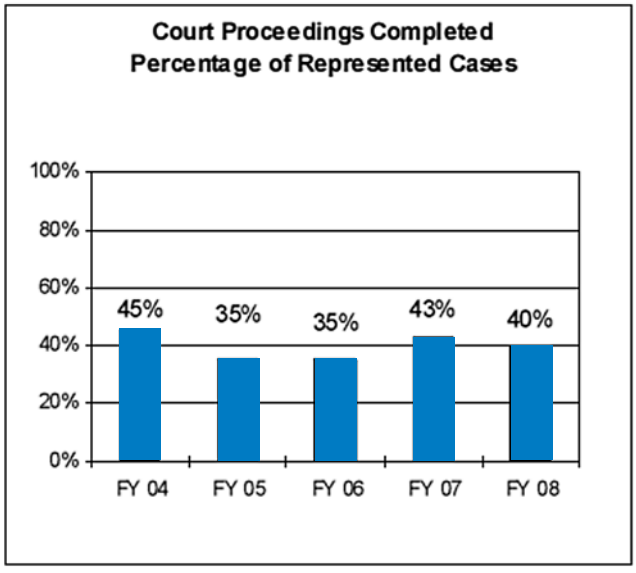
---

129 *See* UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, OFFICE OF THE CLERK, INFORMATION PACKAGE AND INFORMAL BRIEF FORM FOR PRO SE PETITIONERS SEEKING REVIEW OF AN ORDER OF THE BOARD OF IMMIGRATION APPEALS (Dec. 2008), *available at* http://www.ca9.uscourts.gov/opencase/Open_a_Case_ProSe/prose.immigration.caseopening.12-08.pdf.

130 *See* U.S. Department of Justice News Release, EOIR to Expand and Improve Pro Bono Programs (Nov. 15, 2007), *available at* http://www.usdoj.gov/eoir/press/07/ProBonoEOIRExpandsImprove.pdf. *See also* U.S. DEPARTMENT OF JUSTICE FACT SHEET, EOIR'S IMPROVEMENT MEASURES — PROGRESS OVERVIEW (Sept. 8, 2008), *available at* http://www.usdoj.gov/eoir/press/08/EOIRs22ImprovementsProgressOverview090508v2.pdf (noting that EOIR "[b]egan developing regulations to strengthen both the recognition/accreditation process for immigration practitioners and the requirements for private attorneys and organizations to appear on EOIR's List of Free Legal Services Providers").

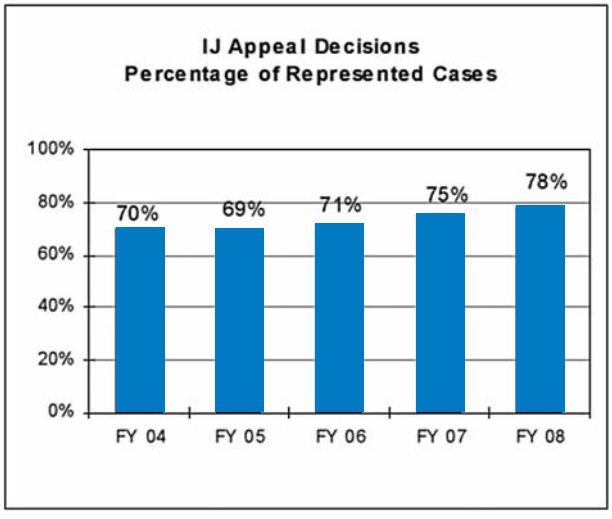
Part 5:
Representation
Appendix of Tables

Table 5-1
Court Proceedings Completed — Percentage of Represented Cases[131]



Representation in Immigration Courts			
	Represented	Unrepresented	Total
FY 04	117,974	141,989	259,963
FY 05	110,621	204,269	314,890
FY 06	113,982	210,062	324,044
FY 07	116,703	156,745	273,448
FY 08	112,231	168,810	281,041

Table 5-2
IJ Appeal Decisions — Percentage of Represented Cases[131]



Represented Before the BIA			
	Represented	Unrepresented	Total
FY 04	32,039	14,007	46,046
FY 05	28,982	13,201	42,183
FY 06	25,883	10,464	36,347
FY 07	23,154	7,597	30,751
FY 08	27,078	7,734	34,812

131 The charts in this appendix are taken from the Executive Office for Immigration Review FY 2008 Statistical Yearbook, *available at* http://www.usdoj.gov/eoir/statspub/fy08syb.pdf.

6

System Restructuring

Reforming the Immigration System

Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases

Prepared by Arnold & Porter LLP for the
American Bar Association Commission on Immigration

American Bar Association
Commission on Immigration
740 Fifteenth Street, NW
Washington, DC 20005-1022
202-662-1005

Part 6: System Restructuring
Table of Contents

I. Introduction on System Restructuring 6-4
  A. A Major Change 6-4
  B. Goals of Restructuring 6-4
  C. The Case for Restructuring 6-4
II. Background on System Restructuring 6-7
  A. Differences Between an Article I Court and an Independent Agency 6-7
  B. Examples of Article I Courts 6-8
    1. Tax Court 6-9
    2. Court of Federal Claims 6-10
    3. Bankruptcy Courts 6-11
  C. Examples of Independent Administrative Agencies for Adjudication 6-12
    1. Occupational Safety and Health Review Commission 6-12
    2. National Labor Relations Board 6-14
    3. Merit Systems Protection Board 6-15
  D. Example of Hybrid System: Veterans Appeals 6-17
  E. Restructuring Proposals for Immigration Adjudication 6-19
    1. Proposals for an Article I Court 6-19
    2. Proposals for an Independent Agency 6-21
      a. In General 6-21
      b. AILA Draft Legislation 6-21
  F. Proposals to Have Immigration Judges Be Administrative Law Judges 6-22
III. Evaluation of Options for System Restructuring 6-26
  A. Features of Each Option 6-26
    1. Article I Court for Entire System 6-26
      a. Selection of Judges 6-26
      b. Tenure 6-28
      c. Removal 6-28
      d. Supervision and Evaluation 6-29
      e. Discipline 6-29
    2. Independent Agency for the Entire System 6-30
      a. Selection of Judges 6-30
      b. Tenure 6-31
      c. Removal 6-32
      d. Supervision and Evaluation 6-32
      e. Discipline 6-32
    3. Hybrid Approach 6-32
      a. Article I Appellate Court 6-33
      b. Independent Trial Level Agency 6-33

B. Comparative Analysis 6-33
1. Independence 6-34
2. Perceptions of Fairness 6-34
3. Quality of Judges and Professionalism 6-34
4. Efficiency: Relative Cost and Ease of Administration 6-34
5. Accountability 6-34
6. Impact on Article III Courts 6-34
C. Other Considerations 6-35
1. Additional Arguments in Favor of Article I Court 6-35
2. Arguments Against an Article I Court 6-35
IV. Recommendations for System Restructuring 6-35
A. Choice Among Options 6-35
B. Transitional Measures 6-36
Table 6-1: Features of Major Restructuring Systems 6-37
Table 6-2: Comparison of Major Restructuring Options 6-40

Part 6: System Restructuring

I. Introduction on System Restructuring

A. A Major Change

The previous chapters have made recommendations for incremental changes to the immigration adjudication system at each stage of the process. We also have considered major structural changes that would make the system independent of any executive branch department or agency. These changes would address widespread concerns regarding both political independence and adjudicatory fairness, while promoting greater efficiency and professionalism within the immigration judiciary.

We have considered three basic restructuring options, as follows:

(1) An independent Article I court system to replace all of EOIR (including the immigration courts and Board of Immigration Appeals), which would include both a trial level and an appellate level tribunal;

(2) A new executive adjudicatory agency, which would be independent of any other executive department or agency, replace EOIR, and contain both trial level administrative judges and an appellate level review board; and

(3) A hybrid approach placing the trial level adjudicators in an independent administrative agency and the appellate level tribunal in an Article I court.

In Section II, we explore the differences between Article I courts and independent agencies generally and then review current examples of each. In Section III, we define the specific features of each option and compare the systems. In Section IV, we set forth our recommendation from among the three options for restructuring the immigration adjudication system.

While all three options have significant advantages over the current system, after careful consideration, we do not recommend the hybrid option since it is too complex and too costly relative to the other two options. The remaining two options are both excellent and offer vast improvements over the current system. The Article I court has been selected as the preferred restructuring option, with the independent agency option being a close second choice. Both options offer greater independence, fairness and perceptions of fairness, professionalism, and efficiency than the current system. The Article I model, however, is likely to be viewed as more independent than an agency because it would be a wholly judicial body; is likely, as such, to engender the greatest level of confidence in its results; can use its greater prestige to attract the best candidates for judgeships; and offers the best balance between independence and accountability to the political branches of the federal government.

B. Goals of Restructuring

Any major system restructuring should be aimed at attaining the following goals:

- *Independence*: Immigration judges at both the trial and appellate level must be sufficiently independent, with adequate resources, to make high-quality, impartial decisions free from any improper influence, particularly where that influence makes the judges fear for their job security.
- *Fairness and perceptions of fairness*: Not only must the system actually be fair, it must appear fair to all participating, particularly to the noncitizen who may not have any other experience with our government.
- *Professionalism of the immigration judiciary*: Immigration judges should be talented and experienced lawyers who treat those appearing before them with respect and professionalism. This, along with increased perceptions of fairness, should decrease the number of appeals both within the system and to the courts of appeals.
- *Increased efficiency*: An immigration system must process immigration cases quickly without sacrificing quality, particularly in cases where immigrants are detained. This goal becomes even more important in light of the Obama Administration's plans to have immigration status checked for persons booked at all state and local jails and prisons, since this is likely to greatly increase the number of persons entering the immigration adjudication system.

C. The Case for Restructuring

Concerns about the lack of independence of immigration judges and the BIA, as well as perceptions of unfairness toward immigrants, have spawned proposals to separate these tribunals from the Department of Justice ("DOJ"). The National Association of Immigration Judges ("NAIJ") and others have long advocated for the establishment of an independent body, either an independent agency or an

Article I court, as a necessary step in reforming the immigration adjudication system.[1]

Changes in recent years have only exacerbated these concerns, as resources devoted to enforcement of immigration laws have increased the burden on immigration judges without increasing the resources allocated to adjudication.[2] The calls for independence have become more urgent in the past decade in response to politicized hiring of immigration judges (see Part 2 of this Report) and the removal of BIA members most sympathetic to noncitizens (see Part 3). In addition, as discussed in Part 2, DOJ has taken the view that immigration judges are merely staff attorneys of the Department. As such, they would be required to comply with rules of conduct applicable to DOJ attorneys, rather than rules of judicial conduct, and would owe their ethical obligations to the Department as their "client." In such circumstances, the immigration judges can hardly be viewed as independent.

In addition, several reforms directed at the BIA, described in detail in Part 3 of this Report, have, according to the ABA, "resulted in a loss of confidence in the fairness of review at the BIA and generated a massive number of appeals to the federal courts."[3] Indeed, the ABA has noted that the lack of independence of immigration courts and the BIA is a problem, and has expressed the view that a number of problems with immigration adjudication "can best be addressed by moving toward a system in which immigration judges are independent of any executive branch cabinet officer."[4] It recently stated that it was considering how such a system might best be implemented.[5]

Appleseed has echoed the call for independence in its newly released report on reform of the nation's immigration court system, stating:

> [W]e have seen time and again how DOJ can influence decisions by Immigration Judges and BIA members — from the 2002 "streamlining reforms" that replaced careful BIA review with expediency, to the Attorney General's power to transfer Immigration Judges and BIA members with whom he disagrees, to DOJ's ability to "manage the caseload and set the standards for review." The ability to engage in this kind of mischief can never be fully eliminated unless immigration cases are heard in an independent court.[6]

The need for adjudicatory independence and accountability itself spawned the creation of EOIR. The DOJ thought this independence would be achieved by moving the immigration judges and BIA from the Immigration and Naturalization Service ("INS") and putting these "quasi-judicial functions" under EOIR within DOJ.[7] This removal, however, has not achieved this purpose.[8] Many critics argue that judicial

---

1 *See, e.g.*, Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish an Article I Immigration Court*, 13-1 BENDER'S IMMIGR. BULL. 1 (2008); NAT'L ASSOC. OF IMMIGRATION JUDGES, IMMIGRATION COURT NEEDS: PRIORITY SHORT LIST (2008) (on file with the American Bar Association Commission on Immigration); U.S. COMM'N ON IMMIGRATION REFORM, BECOMING AN AMERICAN: IMMIGRATION AND IMMIGRANT POLICY 174-82 (1997) (recommending an independent Agency for Immigration Review), *available at* http://www.utexas.edu/lbj/uscir/becoming/full-report.pdf; Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 386-87 (2007). For an expanded version of the Refugee Roulette study, with commentary by scholars from Canada and the United Kingdom as well as from the United States, please see JAYA RAMJI-NOGALES, ANDREW I. SCHOENHOLTZ & PHILIP G. SCHRAG, REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM (NYU Press 2009).

2 *See* ABA, ENSURING FAIRNESS AND DUE PROCESS IN IMMIGRATION PROCEEDINGS 6 (2008) [hereinafter ENSURING FAIRNESS], *available at* http://www.abanet.org/poladv/transition/2008dec_immigration.pdf.

3 *Id.*

4 *Id.*

5 *Id*.

6 APPLESEED, ASSEMBLY LINE INJUSTICE: BLUEPRINT TO REFORM AMERICA'S IMMIGRATION COURTS 35 (2009), *available at* http://www.appleseeds.net/Portals/0/Documents/Publications/Assembly%20Line%20Injustice.pdf.

7 ENSURING FAIRNESS, *supra* note 2, at 1; Board of Immigration Appeals; Immigration Review Function; Editorial Amendments, 48 Fed. Reg. 8,038 (Feb. 25, 1983) (codified at 8 C.F.R. § 1003.0).

8 *See* Marks, *supra* note 1; *Immigration Reform and the Reorganization of Homeland Defense: Hearing Before the Subcomm. on Immigration, Border Security and Citizenship of the S. Comm. on the Judiciary*, 107th Cong. (2002) (testimony of Hon. Dana Marks Keener, President, NAIJ) (recommending an amendment to proposed legislation which creates "language to ensure decisional independence").

independence could be better achieved through a complete system restructuring.[9]

In providing greater independence, such a restructuring would promote the achievement of the other three goals articulated above — fairness and improved perceptions of fairness, a more professional immigration judiciary, and greater efficiency in the adjudication of removal cases.

Fairness and Perceptions of Fairness. Critics note that a perception of unfairness plagues the current system. A perceived lack of independence means that those going through the system do not consider the verdicts rendered to be fair or impartial.[10] Although the adjudicators' agency, DOJ, no longer has primary enforcement responsibility for immigration matters, it remains the nation's principal law enforcement agency overall, and its lawyers prosecute immigration cases before the federal courts of appeals. For some, the Attorney General's power over the members of the BIA and immigration judges "gives the impression of unfairness" and does not give those going through the process confidence in the decision making.[11] The DOJ position that immigration judges are merely DOJ staff attorneys with a duty of loyalty to the Department (as noted above) can only add to the perception that impartiality is lacking.

Professionalism. We recognize that in order to have better quality judgments, better quality judges are necessary, regardless of how this is achieved. Moving existing judges to an Article I court (or separate agency) without increasing resources, training, and qualifications would not alone ensure sufficient improvement in the quality of decisions. Elsewhere in this Report, we recommend such increases in resources and training and the strengthening of qualifications — all of which should help make the immigration judiciary more professional. We also believe it is necessary to make this judiciary independent in order to attract the highest quality judges who can do their jobs and make decisions without fear of arbitrary termination, transfer, or other sanctions.

Efficiency. By attracting and selecting the highest quality lawyers as judges, an Article I court or independent agency is more likely to produce well-reasoned decisions. Such decisions, as well as the handling of the proceedings in a highly professional manner, should improve the perception of the fairness and accuracy of the result. Perceived fairness, in turn, should lead to greater acceptance of the decision without the need to appeal to a higher tribunal.[12] NAIJ suggests there would be a decrease in the number of cases going to the courts of appeals if the immigration trial and appellate bodies were independent Article I courts, because the aggrieved party would experience a greater confidence in the decision of such courts.[13] Similarly, there should be fewer appeals from decisions at the trial level to the appellate level of the Article I court or independent agency. When appeals *are* taken, decisions that are more articulate should enable the reviewing body at each level to be more efficient in its review and decision making and should result in fewer remands requesting additional explanations or fact finding.

Such improvements in efficiency should reduce the total time and cost required to fully adjudicate a removal case and thus help the system keep pace with expanding caseloads. They also should produce savings elsewhere

---

9 *Cf.* Stephen Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 Iowa L. Rev. 1291, 1398-99 (1986) (assessing and rejecting an Article I immigration court). Notably, Professor Legomsky has since changed his views on this issue, and now supports an Article I immigration court proposal. As he explains, "Writing twenty years ago, I thought such a significant change unnecessary; the culture of several decades had suggested that the jobs of immigration judges and BIA members were secure. The events of 2002 and 2003 [Attorney General Ashcroft's reassignment of liberal BIA members to lower-level or nonadjudicative positions] have altered my thinking. I now believe I was shortsighted to dismiss future threats to the independence of the administrative adjudicators and today would favor making them an independent entity within the executive branch." Stephen H. Legomsky, *Deportation and the War on Independence*, 91 Cornell L. Rev. 369, 405 (2006) (internal citations omitted). Professor Legomsky recently reaffirmed the latter view in an interview with the study team.

10 *See* Leon Wildes, *The Need for a Specialized Immigration Court: A Practical Response*, 18 San Diego L. Rev 53, 58-59 (1980).

11 *Id.* For example, there is a perceived disparity between immigration judges' treatment of DHS attorneys and asylum applicants' attorneys. This arises from incidents such as recently promulgated regulations to discipline immigration attorneys who bring frivolous cases before the immigration courts. *See* 73 Fed. Reg. 76,914 (Dec. 18, 2008) (declaring disciplinary measures against immigration attorneys); 74 Fed. Reg. 201 (Jan. 5, 2009) (clarifying previous announcement of new disciplinary rules against practitioners). There are no regulations that authorize immigration judges or the BIA either to discipline or ask for disciplinary proceedings against DHS attorneys who submit frivolous filings or obstruct the process of a case. Concerns regarding this new regulation seem particularly justified given that disciplinary proceedings may be started by either EOIR or DHS. *See* 73 Fed. Reg. at 76,918.

12 *See generally* Thane Rosenbaum, The Myth of Moral Justice: Why Our Legal System Fails to Do What's Right (HarperCollins 2004).

13 *See* Marks, *supra* note 1, at 3.

in the system, such as the cost of detaining those who remain in custody during the proceedings.

Other Benefits. Creating an Article I court or independent agency for immigration adjudication would have still other potential benefits. For example, an Article I court or independent agency would:

- With proper resources, be better equipped to keep clear records and transcripts of proceedings;
- Provide an independent source of statistical information to assist the public in evaluating its performance;[14]
- Submit its own funding requests to Congress, allowing it to request adequate resources without relying on a parent agency;[15]
- Provide better focus on the adjudication function by separating it from a large department whose attention and resources are widely diffused; and
- Leave DOJ free to focus on law enforcement, terrorism, civil rights, and other important missions.

Counterarguments. Nevertheless, doubts persist as to the ability of an Article I court or independent agency to overcome longstanding deficiencies in the immigration adjudication system. One author suggested that while an Article I court would increase the prestige and position of the immigration judges, it would not do anything to increase the rights of those going through the system and facing deportation, which may be the real problem.[16] Other practitioners have pointed out that changing the structure does not change the judges or DHS's interpretations of the law. One noted that the current system worked well before recent increased emphasis on enforcement and an expansive reading of the law that focuses on detention rather than alternatives.[17]

There is also the question of funding. Public opinion of the immigration courts is not always high, particularly at a time when there are many pressing national issues facing the federal government. A new court or agency would face stiff competition for resources. However, the budget for the immigration judiciary would not have to compete for funding with other priorities within the same department, as it does now in DOJ.

The main thrust of most criticisms or doubts expressed about an independent court or agency seems to be that it will not necessarily solve *all* of the current problems with the existing system. That, however, does not diminish the case for attacking problems that *can* be addressed by creating an independent immigration judiciary.

II. Background on System Restructuring

A. Differences Between an Article I Court and an Independent Agency

Article I, Section 8 of the Constitution grants Congress the power to "constitute Tribunals inferior to the supreme Court."[18] These are known as "Article I courts" or, occasionally, "legislative courts."[19] From a strictly legal standpoint, the distinction between Article I courts and independent agency adjudicatory bodies, however, is not entirely clear. It appears that the distinction may be in name only and that whatever forum Congress decides is appropriate dictates.

The similarities between the two types of bodies are striking. In both forums, members are often appointed by the President with the advice and consent of the Senate, serve for set terms, and are removable only for cause. Like Article I courts, agency adjudicatory bodies are specialized judicial entities that can create precedent and issue final decisions appealable to Article III courts. Both structures provide statutorily recognized independence, job security, and stature, which are missing from the current immigration adjudication system. Some scholars even view administrative adjudicatory bodies as "Article I tribunals" as described by the Constitution, distinct from "Article I courts" in name alone.[20]

---

14 *Id.* at 10-11. The BIA currently does not keep adequately detailed statistics. *See also* Ramji-Nogales et al., *supra* note 1, at 373.

15 Marks, *supra* note 1, at 11.

16 *See* Wildes, *supra* note 10, at 57.

17 Interview with Professor Nancy Morawetz, head of New York University School of Law Immigrant Rights Clinic.

18 U.S. CONST., art. I, § 8.

19 20 CHARLES ALAN WRIGHT & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE DESKBOOK § 5 (2008).

20 *See, e.g.*, James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power*, 118 HARV. L. REV. 643, 651-52, 658-59 (2004).

In practice, however, there are many differences between the two types of forums. Adjudicatory agencies often consist of a board or commission, small in size, with members appointed by the President, who serve as an appellate layer of review over decisions made by some type of administrative judge at the initial, trial-type level. Article I courts generally consist only of a trial level, with appeals proceeding directly to an Article III appellate court (or trial court in bankruptcy cases) without an intermediate level of review, or only an appellate level that reviews decisions of an administrative agency. We are not aware of any Article I court system that includes both a trial level and appellate level (except for bankruptcy courts in four federal circuits).[21] Agencies employ administrative judges or Administrative Law Judges ("ALJs"), whose employment terms and hiring procedures differ from those used for Article I judges.

Our research indicates that, for whatever reason, Article I courts tend to be viewed as more independent and prestigious than agency adjudicatory bodies.[22] Article I judges "most closely approximate the formal independence of federal judges."[23] Article I courts also have "low political profiles" as compared to administrative agencies; thus, the President is unlikely to deny reappointment of judges for strictly political reasons.[24] In addition, the long length of the terms of Article I judges serves to reduce the attractiveness of seeking reappointment versus retirement.[25]

Article I courts are "true courts, in the sense that they do nothing but adjudicate," whereas most agencies also use rulemaking as a form of policymaking.[26] This characteristic "has led to some structural and legal accommodations that affect adjudicative independence."[27] Splitting the agency policy-making functions from the adjudication functions, as in the Department of Labor and the Occupational Health and Safety Review Commission, does not necessarily increase fairness and independence.[28] (*See infra* Section II.C.1.) The protections for ALJs under the Administrative Procedure Act do, however, somewhat increase independence.[29]

Finally, Article III courts tend to be more deferential to agency decisions than decisions of other courts, indicating that if a more searching Article III review is desired, an Article I court is a better solution.[30]

B. Examples of Article I Courts

Congress has used its Article I powers to create several specialized courts that help inform consideration of an Article I immigration court. These are the United States Tax Court,[31] the United States Bankruptcy Court,[32] the United States Court of Federal Claims,[33] and the Court of Appeals for Veterans Claims.[34] None of these existing courts serves as a perfect model for an immigration system. No single system is particularly comparable to the immigration

---

21 *See infra* Section II.B.3.

22 *See* Peter Levinson, *A Specialized Court of Immigration Hearings and Appeals*, 56 NOTRE DAME L. REV. 644, 651 n.52 (1981) ("On various occasions Congress has recognized that a judicial forum provides a more appropriate structure for resolving controversies that had been left to executive decision making [through agency boards] in the past"); Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329, 351 (1991) (comparing Legislative (Article I) Judges and Administrative Judges).

23 Bruff, *supra* note 22, at 344.

24 *Id.*

25 *Id.*

26 *Id.* at 345.

27 *Id.*

28 *Id.* at 347. Bruff cites to a 1990 Administrative Conference study of this arrangement that "was unable to conclude whether split enforcement better promotes fairness than traditional agency structure." *Id.*

29 *See id.*

30 Where we have been able to find statistics regarding reversal and affirmance rates on appeal, we have included them within this Study. We were not able to find detailed numbers for all comparative bodies that we examined.

31 26 U.S.C. § 7441. Although the Tax Court was originally created as an administrative agency, Congress formally made it an Article I court in 1969.

32 28 U.S.C. § 151(a). Prior to the Bankruptcy Act of 1978, the federal district courts acted as bankruptcy courts. 20 WRIGHT & KANE, *supra* note 19, at § 12.

33 28 U.S.C. § 171(a).

34 38 U.S.C. § 7251.

court system in terms of scope and size. The process for judge selection in these courts, for example, may not work as well with immigration judges because there are many more of them, and many feel that several years of specialized experience is particularly valuable for a judge in this complex, high volume, and frequently changing field.[35] In addition, no Article I court has both an appellate body (system-wide) and a trial level court. Therefore, although the experience and best practices of existing Article I courts provide a guide for an Article I immigration system, no one system is truly comparable to what an Article I immigration system would look like.

1. Tax Court

The United States Tax Court provides a forum for a taxpayer to dispute a tax deficiency as determined by the IRS.[36] It exercises only judicial power and has no administrative or legislative powers.[37] The Tax Court's principal location is Washington, D.C., but it sits in various designated cities for the purposes of trial.[38]

The Tax Court consists of 19 judges who are appointed by the President, with the advice and consent of the Senate "solely on the grounds of fitness to perform the duties of office."[39] The judges serve 15-year terms and are eligible for reappointment, but face mandatory retirement at age 70.[40] They are paid at the same rate and same manner as district court judges.[41] The judges designate one judge to serve as Chief Judge biannually.[42] They are removable by the President, after notice and opportunity for public hearing, only for "inefficiency, neglect of duty, or malfeasance in office, but for no other cause."[43]

Appeals from the Tax Court go to the federal court of appeals for the circuit where the taxpayer resides or where a corporate taxpayer has its principal place of business.[44] The standard of review is the same as in appeals from district court decisions in cases tried without a jury[45] — "clearly erroneous" for findings of fact, de novo review for legal questions and abuse of discretion for discretionary actions by trial judges.[46] The Tax Court will follow the precedent of the circuit to which appeal lies from a decision.[47] Although we were unable to find statistics on the Tax Court's reversal rates on appeal, the circuit courts in general are deferential to Tax Court decisions, in part because of the complexity of the law involved.[48]

The Tax Court was created by the Tax Reform Act of 1969.[49] There is very little legislative history, but what does exist focused on the change from administrative agency to a court.[50] The Tax Court is the successor to the Board of Tax Appeals, an agency that operated independently of the Bureau of Internal Revenue (the predecessor to the IRS) and the Treasury.[51] This

---

35 Interview of Judge Dana Marks, President, National Association of Immigration Judges.

36 United States Tax Court: About the Court, *available at* http://www.ustaxcourt.gov/about.htm (last updated Sept. 10, 2008); *see also* 26 U.S.C. § 7442.

37 Deborah A. Geier, *The Tax Court, Article III, and the Proposal Advanced by the Federal Courts Study Committee: A Study in Applied Constitutional Theory*, 76 Cornell L. Rev. 985, 995 (1991).

38 26 U.S.C. § 7445; United States Tax Court: About the Court, *supra* note 36; *see also* United States Tax Court: Places of Trial, http://www.ustaxcourt.gov/dpt_cities.htm (last visited Dec. 24, 2009) (listing trial locations).

39 26 U.S.C. § 7443.

40 *Id.* §§ 7443, 7447.

41 *Id.* § 7443(c)(1).

42 *Id.* § 7444(b).

43 *Id.* § 7443(f).

44 *Id.* § 7482(b).

45 *Id.* § 7482(c).

46 *See* Johanson v. Comm'r of Internal Revenue, 541 F.3d 973, 976 (9th Cir. 2008) (construing 26 U.S.C. § 7482(a)); Wheeler v. Comm'r of Internal Revenue, 521 F.3d 1289, 1291 (10th Cir. 2008) (same); Green v. Comm'r of Internal Revenue, 507 F.3d 857, 866 (5th Cir. 2007) (same); Comm'r of Internal Revenue v. Dunkin, 500 F.3d 1065, 1068 (9th Cir. 2007) (abuse of discretion).

47 Golson v. Comm'r, 24 T.C. 742, 756-58 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1970).

48 Bruff, *supra* note 22, at 337.

49 Geier, *supra* note 37, at 986-87.

50 *Id.*

51 17 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4102 (2008).

independence was viewed as important to achieving "as equitable a review of tax liabilities as possible."[52]

Like the current Tax Court, the Board of Tax Appeals had no policymaking or regulatory powers.[53] The Tax Court is not perceived as having a pro-government or pro-taxpayer bias.[54] The background of the judges reflects this neutrality — in 1995, for example, 9 of 15 came from the private sector, with the remaining judges coming from government positions.[55]

The NAIJ advocates modeling the immigration Article I courts on the United States Tax Court because it is a "legal success story,"[56] as discussed further in Section II.E.1 below.

2. Court of Federal Claims

The Court of Federal Claims ("CFC") was created under the Federal Courts Improvement Act of 1982, the same statute that created the Court of Appeals for the Federal Circuit.[57] The CFC was primarily a restructuring of the previous existing trial functions of the Court of Claims.[58] The jurisdiction of the CFC is quite broad compared to other Article I tribunals, extending to disputes involving tax claims, government contracts, constitutional takings, civilian and military pay, intellectual property, vaccine injury cases, and claims by Indian tribes.[59]

The principal office of the CFC is located in Washington, D.C., but, by statute, the CFC may hold court "at such times and in such places as it may fix by rule of court."[60] The CFC is treated like a district court for budgetary and support services.[61]

CFC judges are appointed by the President with the advice and consent of the Senate.[62] The President also designates one judge to serve as Chief Judge.[63] The background of the judges varies, but most have some connection to the federal government.[64] Judges serve for terms of 15 years and are eligible for reappointment.[65] Although only 16 judges officially serve on the CFC, there are a number of senior judges as well.[66]

A judge sitting on the CFC may be removed only by a majority of the Court of Appeals for the Federal Circuit during his or her term for "incompetency, misconduct, neglect of duty, engaging in the practice of law, or physical or mental disability."[67] A judge subject to removal has an opportunity to be heard on the charges.[68]

Appeal lies solely with the Court of Appeals for the Federal Circuit.[69] Filing an appeal is done in the same way as filing an appeal from a decision of a district court.[70] The recent reversal rates of CFC opinions by the Federal Circuit were 8% in 2008, 14% in 2007, 19%

52 *Id.*

53 *Id.*

54 Bruff, *supra* note 22, at 336-37; David Laro, *The Evolution of the Tax Court as an Independent Tribunal*, 1995 U. ILL. L. REV. 17, 24-25 (1995).

55 Laro, *supra* note 54, at 25.

56 *See* Marks, *supra* note 1, at 2. For a critique of the Tax Court system and a proposal to make it "more judicial," see Leandra Lederman, *Tax Appeal: A Proposal to Make the United States Tax Court More Judicial*, 85 WASH. U. L. REV. 1195 (2008).

57 Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (1982).

58 Richard A. Seamon, *The Provenance of the Federal Courts Improvement Act of 1982*, 71 GEO. WASH. L. REV. 542, 546 (2003). Prior to 1982, the court consisted of 15 commissioners who were authorized to make recommendations and conclusions of law, which were then reviewed by five judges for issuing of a final decision. *See* United States Court of Federal Claims, United States Court of Federal Claims — The People's Court, http://www.uscfc.uscourts.gov/sites/default/files/court_info/Court_History_Brochure.pdf (last visited Dec. 24, 2009).

59 United States Court of Federal Claims, About the Court, http://www.uscfc.uscourts.gov/about-court (last visited Dec. 24, 2009).

60 28 U.S.C. § 173.

61 Loren A. Smith, *Why a Court of Federal Claims?*, 71 GEO. WASH. L. REV. 773, 776-77 (2003).

62 28 U.S.C. § 171(a).

63 *Id.* § 171(b).

64 Smith, *supra* note 61, at 786.

65 28 U.S.C. § 172(a).

66 Court of Federal Claims, Judges Biographies, http://www.uscfc.uscourts.gov/judges-biographies (last visited Dec. 24, 2009). There are currently eight senior judges. *Id.*

67 28 U.S.C. § 176(a).

68 *Id.* § 176(b).

69 *Id.* § 1295(a)(3).

70 *Id.* § 1522.

in 2006, 12% in 2005, and 11% in 2004.[71] These reversal rates are comparable, although perhaps not as consistent, as the rate for circuit court reversals of district court civil decisions in cases in which the United States was a party.[72]

The rationale behind the creation of the CFC was to create a national court that could handle cases throughout the country in specific, important subject areas and develop a national uniform body of law in these areas.[73] The court has been criticized because of its failure to be a real "specialist" court, as its jurisdiction is fairly wide.[74] It has generally not been criticized, however, for having a particular political bent, even by those critical of the court.[75] Changes in court structure have been based more on disagreements over the court's jurisdictional powers than any independence critique.[76]

The CFC does, however, have problems related to its status as an Article I court. It is, in the words of one commentator, still underfunded and under resourced. Judge Bruggink, currently a senior judge on the court, noted that there is "[a] lack of any clear location for the court in the Government's organizational chart," resulting in a lack of support from the Administrative Office of the Courts.[77]

3. Bankruptcy Courts

The bankruptcy courts are contained within the judiciary and are effectively Article I extensions of Article III courts. The district courts have jurisdiction over bankruptcy matters but are empowered to "refer" the matters to the bankruptcy court, with most districts having a standing referral order so that all bankruptcy cases are handled by the bankruptcy court.[78]

Appointment works differently in the bankruptcy courts than in other Article I courts. Bankruptcy judges are appointed for 14-year terms and can be removed by the judges in the federal court of appeals in the circuit in which they serve.[79] This method fosters judicial independence and separation of powers by having the judicial branch of government oversee the appointment process. Bankruptcy judges are removable only for "incompetence, misconduct, neglect of duty, or physical or mental disability."[80]

---

71 Statistics available at U.S. Courts, http://www.cafc.uscourts.gov (last visited Dec. 24, 2009).

72 That reversal rate was 12.3% for the fiscal year ending in 2008, 11.8% in 2007, 11.5% in 2006, 11.1% in 2005, and 12.1% in 2004. U.S. Courts, Statistical Reports, http://www.uscourts.gov/library/statisticalreports.html (last visited Dec. 24, 2009).

73 United States Court of Federal Claims, *supra* note 58; Smith, *supra* note 61.

74 Steven L. Schooner, *The Future: Scrutinizing the Empirical Case for the Court of Federal Claims*, 71 GEO. WASH. L. REV. 714, 747 (2003).

75 *Id.* at 748-49 (noting that "nothing suggests that politics play a greater or lesser role in the selection of COFC judges, when compared to their district court counterparts. Nor is there any unique reason to suggest that the judges' political predilections unduly dominate their work once appointed. If anything, the facts lead to the opposite conclusion.").

76 *See* C. Stanley Dees, *The Future of the Contract Dispute Act: Is it Time to Roll Back Sovereign Immunity?*, 28 PUB. CON. L. J. 545, 545-56 (1999). The legislative history of the act creating the most recent iteration of the court, the Federal Courts Improvement Act, indicates that Congress gave little attention to the reasons behind creating the court other than as a needed place for trial level adjudication of cases that would be appealed to the Court of Appeals for the Federal Circuit, the focus of the act. *See* Seamon, *supra* note 58, at 575-77. Congress did, however, briefly discuss the benefits of replacing commissioners, who were unable to make a final judgment, with judges, who could do so, decreasing duplication of efforts and encourage settlement. *Id.* at 576.

77 Judge Eric Bruggink, *A Modest Proposal*, 28 PUB. CON. L. J. 529, 542 (1999). Judge Bruggink noted that the CFC courthouse lacked enough physical space for both adequate judicial chambers and courtrooms.

78 *See* 28 U.S.C. §§ 157(a) (referral), 1334(a) (district courts' jurisdiction). Bankruptcy courts were created in 1978 as Article I courts, but Congress had to reenact the courts' legislation after the Supreme Court found that Congress had unconstitutionally conferred Article III powers on Article I bankruptcy courts. *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982); 13 WRIGHT & KANE, *supra* note 19, at § 3508. Nonetheless, the courts function as part of Article III district courts. The U.S. Code states: "In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district." 28 U.S.C. § 151. The Federal Judiciary's own website describes bankruptcy courts as Article III courts, and lists separately the Tax Court and Court of Federal Claims. U.S. Courts, About U.S. Federal Courts, http://www.uscourts.gov/about.html (last visited Dec. 24, 2009). Similarly, the Administrative Office of the U.S. Courts provides services to bankruptcy judges along with circuit court, district court, and magistrate judges — but not to the Tax Court. U.S. Courts, Administrative Office Services, http://www.uscourts.gov/ao/services.htm (last visited Dec. 24, 2009). Therefore, although bankruptcy courts are technically Article I courts, they function as a limited jurisdictional unit within an Article III district court.

79 28 U.S.C. § 151 (hiring); *id.* § 152(e) (removal). There are currently 324 bankruptcy judges. *U.S. Needs More Bankruptcy Judges: Judicial Group*, REUTERS, June 16, 2009, *available at* http://www.reuters.com/article/ousiv/idUSTRE55F51U20090616. This number is set by Congress. *See* 28 U.S.C. § 152(a)(2) (listing the number of bankruptcy judges for each judicial district).

80 28 U.S.C. § 152(e).

Bankruptcy courts are also unique in the handling of appeals. Certain federal circuits have formed Bankruptcy Appellate Panels, consisting of three bankruptcy judges, appointed by the circuit court, to hear appeals from the bankruptcy courts.[81] Some have suggested a similar feature for appeals of immigration court decisions, which would allow for a more regional interpretation of immigration laws that may better serve local communities, particularly where immigration and criminal law intersect.[82] Most bankruptcy decisions, however, are appealed to the district courts and then upward.[83]

C. Examples of Independent Administrative Agencies for Adjudication

The current immigration adjudication system has structural similarities to certain other administrative systems. Therefore, this Study has reviewed certain aspects of other systems that may be useful in improving the immigration system. We focused on three agencies: the Occupational Safety and Health Review Commission ("OSHRC"), the Merit Systems Protection Board ("MSPB"), and the National Labor Relations Board ("NLRB").[84]

None of these systems serves as an ideal model for immigration adjudication. Although the NLRB, MSPB, and OSHRC have a great deal of independence and have statutory mandates and protections,[85] they do not handle the large caseload faced by the immigration system. There are, however, some features of these other systems that can be useful in designing an independent agency model for immigration adjudication.

1. Occupational Safety and Health Review Commission

The Occupational Safety and Health Review Commission provides administrative trial and agency-head review of contested citations and penalties resulting from inspections by the Occupational Safety and Health Administration ("OSHA").[86] OSHA is a federal agency within the Department of Labor that is responsible for setting workplace safety and health standards and for inspecting work places to enforce compliance with its standards.[87] OSHRC is independent from OSHA[88] and the Department of Labor.[89] The separation of adjudicatory functions from rulemaking and enforcement functions, as illustrated

81 Appeals go to the Bankruptcy Appellate Panel in the First, Sixth, Eighth, and Ninth Circuits. Even when a panel exists, participants may elect to have their appeal go to a district judge instead. *See id.* § 158(b); U.S. Attorney's Civil Resource Manuel, Bankruptcy Jurisdiction, *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title4/civ00190.htm#2. After the panel decision, cases are appealed to the circuit courts.

82 Interview with Muzaffar Chishti, Director, Migration Policy Institute's Office at New York University School of Law.

83 *See* 28 U.S.C. § 158(a). Amendments to the bankruptcy laws in 2005 created rights of direct appeal under limited circumstances to the circuit court from the bankruptcy court, but most decisions are appealed to the district court first. *See* 28 U.S.C. § 158(d).

84 These agencies were selected because they provided useful comparisons to the immigration adjudication system. The NLRB and MSPB provided a comparison for agencies that have greater independence and statutorily defined appellate bodies, both reforms that have been urged for the immigration system. We chose to look at OSHRC because it is an adjudicatory agency independent from the enforcement agency dealing with work place safety and health standards, OSHA. We also examined the adjudication of disability claims by the Social Security Administration, but the SSA performs many other functions.

There are, of course, many other agencies that could be examined. In 1980, in a list created for the Paperwork Reduction Act, Congress created the following nonexclusive list of "independent" agencies, without defining specifically what that term meant: the Board of Governors of the Federal Reserve System, the Commodity Futures Trading Commission, the Consumer Product Safety Commission, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Energy Regulatory Commission, the Federal Housing Finance Board, the Federal Maritime Commission, the Federal Trade Commission, the Interstate Commerce Commission, the Mine Enforcement Safety and Health Review Commission, the Nuclear Regulatory Commission, the Postal Rate Commission, the Securities and Exchange Commission, and any other similar agencies designated by statute as a Federal independent regulatory agency or commission. 44 U.S.C. §3502(5); *see also* Marshall J. Berger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 Admin. L. Rev. 1111, 1137 (2001).

85 Civil Service Reform Act, Pub. L. 95-454, 92 Stat. 1111 (1978); Occupational Safety and Health Act, Pub. L. 91-596, 84 Stat. 1590 (1970); National Labor Relations Act, Pub. L. 198, 49 Stat. 449 (1935).

86 U.S. Occupational Safety and Health Review Commission, Home, http://www.oshrc.gov (last updated Dec. 14, 2009).

87 U.S. Occupational Safety and Health Review Commission, Freedom of Information Act, http://www.oshrc.gov/foia/foia.html (last updated Aug. 19, 2008).

88 H.R. Rep. No. 109-50 (2005), *available at* http://thomas.loc.gov/cgi-bin/cpquery/T?&report=hr050&dbname=109&.

89 2 Guide to Employment Law and Regulation § 18:1 (2009).

by OSHA and OSHRC, has been referred to as the "split-enforcement" model.[90]

OSHRC is comprised of three Presidentially appointed commissioners who serve staggered six-year terms.[91] The statute governing OSHRC contains no requirements regarding the political party balance of the Commission members.[92] The President designates one of the three members as the chairman, who is responsible for the administrative operations of OSHRC. The chairmanship may be changed by the President at any time.[93] Commissioners, however, may only be removed from office by the President for inefficiency, neglect of duty, or malfeasance in office.[94]

The principal office of OSHRC is located in the District of Columbia. However, OSHRC is permitted to hold meetings and conduct proceedings in other locations when it is in the best interest of the public or the parties involved or such change in location would minimize the expense associated with such proceeding.[95] OSHRC promulgates its own procedural rules that are used in conjunction with the Federal Rules of Civil Procedure, the Federal Rules of Evidence, and the APA.

Before a dispute can be heard by the three commissioners, it is typically first heard by an ALJ. The chairman of OSHRC is responsible for appointing the ALJs. Like ALJs in other administrative agencies, those at OSHRC have unlimited tenure, may be removed only for good cause or reductions in force, and are subject to the laws governing employees in the classified civil service.[96] The ALJ's decision must be in writing and must include findings of fact, conclusions of law, and reasons or bases for them. It must also include an order affirming, modifying or vacating each contested item and directing any other appropriate relief.[97]

The parties (either OSHA or the private party) may object to the ALJ's decision by filing a Petition for Discretionary Review ("PDR") with OSHRC. In addition, any OSHRC commissioner may direct a case for review even without a party filing a PDR.[98] If OSHRC does review an ALJ's decision, its decision becomes the final order. Unless OSHRC orders otherwise, a direction for review establishes jurisdiction in OSHRC to review the entire case.

If an ALJ decision is not reviewed by OSHRC, or after a final order by the Commission, the losing party may request review by the court of appeals for the circuit in which the violation is alleged to have occurred or may elect to file in the District of Columbia Circuit.[99] A party facing an adverse decision from OSHRC may do the same.[100]

In judicial review of contested OSHA cases, courts have typically shown deference to the interpretation given to the statute by OSHRC. However, the Supreme Court has held that OSHA, as the rulemaking agency, deserves more deference in interpreting its statutes than OSHRC when OSHA and OSHRC disagree.[101] The appellate courts have used the "substantial evidence" rule for factual findings, while legal conclusions may be set aside when they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.[102]

Unlike EOIR, OSHRC is wholly independent from any other executive department or agency. However, some commentators have been critical of the split-enforcement model used by OSHA and OSHRC. They

---

90 *See* Richard H. Fallon, Jr., *Enforcing Aviation Safety Regulations: A Case for the Split-Enforcement Model of Agency Adjudication*, 4 ADMIN. L. J. AM. U. 389, 392 (1991); George Robert Johnson, Jr., *The Split-Enforcement Model: Some Conclusions from the OSHA and MSHA Experiences*, 39 ADMIN. L. REV. 315, 315 (1987); *see also* Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1135 (1990); Paul R.Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 DUKE L. J. 257, 268-269 (1988).

91 29 U.S.C. § 661(a), (b); 3 WEST'S FEDERAL ADMINISTRATIVE PRACTICE § 2502 (3d ed. 2008).

92 Occupational Safety and Health Act of 1970, 29 U.S.C. § 661(a) (2004); Marshall J. Breger & Gary J Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN L. REV. 1111, 1139 (2000).

93 MARK A. ROTHSTEIN, OCCUPATIONAL SAFETY AND HEALTH LAW § 16:1 (2009).

94 29 U.S.C. § 661(b).

95 *Id.* § 661(d).

96 *Id.* § 661(k).

97 ROTHSTEIN, *supra* note 93, at § 17:32.

98 29 U.S.C. § 661(j).

99 ROTHSTEIN, *supra* note 93, at § 1.4.

100 29 USC § 660(a); ROTHSTEIN, *supra* note 93, at § 1:4.

101 ROTHSTEIN, *supra* note 93, at § 19:8; *see also* Martin v. OSHRC, 499 U.S. 144, 152 (1991).

102 *See* WALTER B. CONNOLLY, JR. & DONALD R. CROWELL, II, A PRACTICAL GUIDE TO THE OCCUPATIONAL SAFETY AND HEALTH ACT § 10.13 (2008).

argue that split-enforcement arrangements create unnecessary conflicts when Congress fails to specify which agency should prevail when disagreements arise. A related criticism of the split-enforcement model involves whether OSHRC should be able to make policy determinations regarding the statute during enforcement proceedings or whether that encroaches on the purview of OSHA.[103]

Although the number of cases heard by OSHRC and its ALJs is significantly less than the volume found in immigration courts,[104] complaints have been made about too many instances where OSHRC has been unable to act, either due to vacancies in its membership, two members not being present to provide the necessary quorum, or a deadlock occurring among the Commissioners.[105]

2. National Labor Relations Board

The NLRB is an independent agency created by statute to administer the National Labor Relations Act. It was created at the same time as the Act; thus, there was no predecessor, and the NLRB has always existed in its current form.[106] The NLRB has both an administrative and an adjudicatory function. It oversees elections regarding union representation and tries to prevent and remedy unfair labor practices by either employers or unions.[107] Here, we examine only the adjudicatory function.

The NLRB sits in Washington, D.C., but "may meet and exercise any or all of its powers at any other place."[108] The Board consists of five members appointed by the President with the advice and consent of the Senate for five-year, overlapping terms.[109] The President designates one member to serve as Chair.[110] Members are eligible for reappointment[111] and may only be removed "by the President, upon notice and hearing, for neglect of duty or malfeasance in office."[112]

The NLRB also has a General Counsel, typically referred to as the prosecutor, who is separately appointed by the President for a four-year term and is responsible for the investigation and prosecution of unfair labor practice cases.[113] Thus, the "adversary" in NLRB cases is, in fact, within the NLRB itself. The General Counsel is, however, technically independent from the Board.[114]

Cases are heard first by an ALJ, who issues a decision "stating findings of fact and conclusions, as well as the reasons for determinations on all material issues, and making recommendations as to the action which should be taken on the case."[115] If the case is not settled and there is an appeal, the NLRB then reviews the case and issues a decision that may adopt, modify, or reject the findings and recommendations of the ALJ.[116] The NLRB's order must contain detailed findings of fact, conclusions of law, and basic reasons for decision on all material issues raised.[117]

Decisions of the NLRB may come before the federal courts of appeals in one of two ways. First, the Board may petition to an appellate court to enforce the order in the circuit where the unfair labor practice occurred.[118] Second, a person aggrieved by a final order

---

103 Sidney A. Shapiro & Thomas O. McGarity, *Reorienting OSHA: Regulatory Alternatives and Legislative Reform*, 6 YALE J. ON REG. 1, 60-62 (1989).

104 OSHRC had 27 pending cases at the beginning of 2007. During 2007, it received 25 new cases and issued 27 decisions by the end of that year. OSHRC, FISCAL YEAR 2009 PERFORMANCE BUDGET AND JUSTIFICATION (2008), *available at* http://www.oshrc.gov/budget/fy09_budget.htm.

105 AllGov, Occupational Safety and Health Review Commission, http://www.allgov.com/Agency/Occupational_Safety__Health_Review_Commission__OSHRC_ (last visited Dec. 24, 2009); OSHRC, *supra* note 104.

106 NLRB, THE NLRB: WHAT IT IS, WHAT IT DOES, *available at* http://www.nlrb.gov/nlrb/shared_files/brochures/whatitis.pdf.

107 *Id.*

108 29 U.S.C. § 155.

109 *Id.* § 153(a). One member's term expires each year. NLRB, *supra* note 106.

110 29 U.S.C. § 153(a).

111 *Id.* § 154(a).

112 *Id.* § 153(a).

113 *Id.* § 153(d).

114 NLRB, *supra* note 106.

115 29 C.F.R. § 101.11(a).

116 *Id.* § 101.12(a).

117 *Id.*

118 29 U.S.C. § 160(e). Notably, this is the extent of the Board's enforcement power. The Board lacks contempt power, although it can petition the federal court to find a party in contempt for refusing to obey an order.

of the Board may seek review in the circuit where the unfair labor practice allegedly occurred, in the circuit where such person lives or transacts business, or in the District of Columbia Circuit.[119] The appeals courts review these decisions using a substantial evidence standard.[120] The Board is generally afforded considerable deference.[121] In 2007, 68 cases ended up in the federal courts,[122] which affirmed the NLRB in 86.8% of these cases.[123]

Nevertheless, the NLRB has been faced with significant criticism for political bias. The NLRA has been called "a statute in flux with rulings turning on the ideological approach of its interpreters."[124] There are often "abrupt changes in precedent following a change in presidential administration . . . [which] undermines the stability, certainty, and efficiency of its policies."[125] The Board has been described as "polarized" between labor and management forces, which has "eroded the agency's role as a neutral and principled adjudicator."[126] Even the D.C. Circuit has stated that the Board is "rogue," "contumacious," and "the antithesis of reasoned decision-making."[127]

NLRB ALJs have also been criticized for bias, perhaps because many of them come from positions within the NLRB and tend to "harbor the same predilections" they had as employees.[128] Thus, despite the fact that the Board is somewhat independent, and, in a sense, is in control of its own rules and regulations rather than answering to a "higher power" such as DOJ, it does not appear to be free from political influence. This likely affects perceptions of the fairness of its adjudication. In addition, some have asserted that because precedent is constantly changing with shifts in political power in Washington, the NLRB's decisions do not provide consistent legal guidance for unions and management.[129]

3. Merit Systems Protection Board

The Merit Systems Protection Board ("MSPB") was established by the Civil Service Reform Act of 1978 to adjudicate personnel claims involving civil service members.[130] The 1978 statute separated the functions of the former Civil Service Commission into three separate entities — the Office of Personnel Management, the Federal Labor Relations Authority, and the MSPB, which assumed adjudicatory functions over most federal employee personnel disputes.[131] The decision to divide the agency in such a manner was not made lightly. President Carter established nine task forces to study "all aspects of the civil service" prior to the drafting of the legislation.[132] This effort concluded that the credibility of the Civil Service Commission as an impartial adjudicator of personnel decisions was undermined by the fact that personnel policy decisions came from the same office.[133] OPM was meant to represent the interests of the government in such

---

119 *Id.* § 160(f).

120 *Id.* § 160(g). The decision will be upheld as conclusive if "supported by substantial evidence on the record considered as a whole."

121 *See* NLRB v. Curtis Matheson Scientific, 494 U.S. 775, 787 (1990).

122 NLRB, Seventy Second Annual Report Of The National Labor Relations Board 15 (2007), *available at* http://www.nlrb.gov/nlrb/shared_files/brochures/Annual%20Reports/Entire2007 Annual.pdf.

123 *Id.* In 2002-2006, out of 440 total appeals, 318 (72.2%) were affirmed, 28 (6.4%) were remanded, 28 (6.4%) were modified, 49 (11.1%) were set aside, and 17 were affirmed in part and remanded in part (3.9%). *Id.*

124 Peter M. Panken, *Union Organizing and NLRB Representation Cases: A Management Perspective*, *in* Employment and Labor Relations Law for the Corporate Counsel and General Practitioner Coursebook 443 (2008).

125 Clair Tuck, *Policy Formulation at the NLRB: A Viable Alternative to Notice and Comment Rulemaking*, 27 Cardozo L. Rev. 1117, 1118 (2005).

126 James J. Brudney, *Isolated and Politicized: The NLRB's Uncertain Future*, 26 Comp. Labor L. and Pol. J. 221, 243 (2005).

127 Matthew Ginsburg, *A Nigh Endless Game of Battledore and Shuttlecock: The D.C. Circuit's Misuse of Chenery Remands in NLRB Cases*, 86 Neb. L. Rev. 595, 597 (2008) (quotation marks omitted).

128 Panken, *supra* note 124, at 449.

129 Tuck, *supra* note 125, at 1118.

130 Civil Service Reform Act, Pub. L. 95-454, § 7104, 92 Stat. 1111 (1978).

131 *See* Earl Sanders, *5 U.S.C. § 7703(d): The Civil Service Commission Did Not Fade Away-Entirely*, 31 How. L. J. 197, 197 (1988).

132 John P. Stimson, *Unscrambling Federal Merit Protection*, 150 Mil. L. Rev. 165, 167 (1995).

133 *Id.* The legislative history of the Civil Service Reform Act echoes this concern, indicating that this severing of functions evidenced a belief that "the combination of the managerial and employee-protection functions in one agency — the Commission — was unsound, and those functions, to be exercised efficiently, must be divided." Sanders, *supra* note 131, at 198.

disputes, while the MSPB was meant to be a neutral adjudicator, allowing both agencies to perform their functions "to the fullest effect."[134]

The MSPB has its principal office in Washington, D.C., and field offices in other locations.[135] It consists of three members appointed by the President, no more than two of whom may be from the same political party.[136] They are confirmed by the Senate and serve overlapping seven-year, non-renewable terms, which may be extended for up to one year until a replacement is appointed.[137] The President appoints one member as the Chairman, with the advice and consent of the Senate.[138] Members may be removed by the President for "inefficiency, neglect of duty, or malfeasance in office."[139]

The MSPB process typically begins when a federal employee files an appeal of an adverse agency decision, such as termination from employment. The case is handled by an ALJ or an administrative judge; although, the number of administrative judges far exceeds the number of ALJs.[140] Appeals filed by MSPB employees or ALJs and proceedings initiated by the Special Counsel such as Hatch Act cases[141] are referred to an ALJ.[142] In addition, the MSPB has traditionally assigned other "sensitive" cases to an ALJ.[143]

All other cases proceed before an administrative judge, who does not have the status or protections of an ALJ. Unlike the ALJs, the administrative judges are subjected to informal quality control mechanisms, have their decisions reviewed by a regional director before they are issued, and have their performance reviewed as well.[144] On average, it takes three months to receive a decision from an administrative judge or ALJ.[145]

The employee may appeal the decision to the MSPB or directly to the United States Court of Appeals for the Federal Circuit.[146] In the former case, if the MSPB declines to accept review, the employee may then appeal to the Federal Circuit. Generally, the MSPB only accepts review "when significant new evidence is presented that was not available for consideration earlier or when the administrative judge made an error in interpreting a law or regulation."[147]

All decisions by the Board are published and precedential.[148] The MSPB usually affirms the ALJ or administrative judge's decision.[149] The MSPB's final decision may be appealed to the Federal Circuit, which is generally deferential to the Board's decisions, reversing only 7% of MSBP decisions in 2008, 8% in 2007, 8% in 2006, 6% in 2005, and 5% in 2004.[150]

Unlike the NLRB, the MSPB has generally not faced criticism for being politicized. On the contrary, the MSPB has been noted to be a particularly well-

134 *See* Sanders, *supra* note 131, at 199; S. Rep. No. 95-969 5 (1986).

135 5 U.S.C. § 1201.

136 *Id*.

137 *Id.* at § 1202.

138 *Id.* at § 1203(a).

139 *Id.* at § 1202(d).

140 John H. Frye III, *Survey of Non-ALJ Hearing Programs in the Federal Government*, 44 ADMIN. L. REV. 261, 328 (1992).

141 The Special Counsel is appointed by the President with the consent of the Senate. In general, the Special Counsel brings proceedings to correct prohibited personnel practices by agencies and to discipline employees. *Id.* at 328.

142 *Id*; 5 C.F.R. §§ 1201.13, 1201.124(a)(3), 1201.135(a).

143 Press Release, U.S. Merits Sys. Prot. Bd., MSPB to Use NLRB Administrative Law Judges (Mar. 9, 2001), *available at* http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=236476&version=236735&application=ACROBAT.

144 MSPB sets quantitative standards for minimally satisfactory performance, fully satisfactory performance, and performance that exceeds the standard, while the ALJs are not subject to these quantitative standards. Frye, *supra* note 140, at 329.

145 U.S. MERITS SYS. PROT. BD., PERFORMANCE AND ACCOUNTABILITY REPORT FOR FY 2008, at 15 (2008). This is an average rate over the period 2005-2008.

146 *Id.*

147 5 C.F.R. § 1201.115.

148 Jessica L. Parks, *The Merit Systems Protection Board as a Model Forum*, 4 FED. CIR. B. J. 15, 18 (2004).

149 Paul Secunda, *Whither the Pickering Rights of Federal Employees?*, 79 U. COLO. L. REV. 1101, 1129-1130 (2008).

150 U.S. Courts, Table B-8: U.S. Court of Appeals for the Federal Circuit — Appeals Filed, Terminated, and Pending, During the Twelve-Month Period Ended September 30, 2008 [hereinafter CAFC, Table B-8], *available at* http://www.cafc.uscourts.gov/pdf/b08sep08.pdf.

functioning body that issues quality decisions and processes cases efficiently.[151] This perhaps stems from the legislative scheme that created the MSPB as a neutral adjudicator (as discussed above). The perceived lack of bias in the MSPB may also be at least partially attributed to the fact that the disputes it handles are less politically charged than those before the NLRB or those that would come before an immigration agency.

D. Example of Hybrid System: Veterans Appeals

The system for granting and assessing veterans' benefits is the only existing hybrid adjudication model we found, consisting of an agency within the executive branch for trial-level proceedings, an Article I court for initial appellate review, and final review in an Article III court. It is, however, a system with a very different emphasis and philosophy, because Congress designed it to aid veterans and minimize its adversarial nature. This may limit its applicability to immigration, because there may not be political support for a similarly "pro-claimant" system.

The veterans' benefits system consists of several layers. First, the veteran files a claim for benefits with the Regional Office.[152] The veteran may lodge an appeal with the Board of Veterans Appeals ("BVA"). The Regional Offices and the BVA both sit within the Department of Veterans Affairs ("VA"). Appeals from the BVA are heard by the Court of Appeals for Veterans Claims ("CAVC"), which is an Article I court.[153] If the BVA decides adversely against the veteran, the veteran may appeal to the CAVC, but the *agency* may not appeal a decision to grant benefits.[154] The veteran or the agency may appeal from an adverse determination by the CAVC to the Court of Appeals for the Federal Circuit ("CAFC" or "Federal Circuit"), but only on questions of law.[155]

The BVA was created in 1933.[156] It currently consists of a Chairman, a Vice Chairman, a Principal Deputy Vice Chairman, and four Deputy Vice Chairmen who are in charge of four regional "Decision Teams." The President appoints the Chairman on the advice and consent of the Senate.[157] The Chairman serves for six years, may serve for more than one term,[158] and is removable by the President alone for "misconduct, inefficiency, neglect of duty, or engaging in the practice of law or for physical or mental disability which, in the opinion of the President, prevents the proper execution of the Chairman's duties."[159] The Secretary of VA appoints the other BVA members from a list of recommendations from the Chairman, subject to approval by the President.[160] The Secretary also chooses the Vice Chairman from existing members.

Cases are heard by Veteran Law Judges ("VLJ"), 60 of whom are employed by the BVA. A VLJ is not an ALJ, is not appointed through the Office of Personnel Management, and is subject to performance review.[161] Those VLJs not meeting the standards set for job performance may be removed by the Secretary on the Chairman's recommendation.[162] The Secretary may only remove a VLJ for a matter unrelated to job

---

151 *See* Parks, *supra* note 148, at 16-17. Although this article was written while Ms. Parks was serving as a member of the MSPB, this particular statement was based on her experience as a litigator for the United States Government, where she appeared before the MSPB as well as many other federal administrative forums.

152 Paul R. Verkuil & Jeffrey S. Lubbers, *Alternative Approaches to Judicial Review of Social Security Disability Cases*, 55 ADMIN. L. REV. 731, 763 (2003). There are a few special categories of benefits that do not require active wartime service. *Id.*

This section does not focus on the Regional Offices, partly because there is little statistical information on them, but the House recently conducted hearings into the Regional Offices' systematic failures in processing claims. *See Document Tampering and Mishandling at the Veterans Benefits Administration: Hearing Before the Subcomm. on Disability Assistance and Memorial Affairs of the H. Comm. on Veterans' Affairs*, 111th Cong. (2009), *available at* http://veterans.house.gov/hearings/hearing.aspx?NewsID=340.

153 Formerly the Court of Veterans' Appeals, the name was changed in 1999.

154 38 U.S.C. § 7252(a); Gary E. O'Connor, *Rendering to Caesar: A Response to Professor O'Reilly*, 53 ADMIN. L. REV. 343, 351 (2001).

155 38 U.S.C. § 7292; Verkuil & Lubbers, *supra* note 152, at 763.

156 BOARD OF VETERANS APPEALS, ANNUAL REPORT TO CONGRESS 2008, at 3 (2008) [hereinafter BOARD ANNUAL REPORT].

157 38 U.S.C. § 7101(b)(1).

158 *Id.* § 7101(b)(1), (3).

159 *Id.* § 7101(b)(2).

160 *Id.* § 7101A(a)(1).

161 The BVA Chairman is required by law to set up a panel of VLJs to review the VLJs' performance. *Id.* § 7101(c)(1)(A).

162 *Id.* § 7101A(c)-(d).

performance under the same circumstances as prescribed for ALJs, including a hearing before the Merit Systems Protection Board.[163]

The BVA generally receives about 40,000 new cases each fiscal year.[164] In FY 2008 it issued an average of 167 decisions (nearly 3 decisions per VLJ) per working day.[165]

Congress established the CAVC as an Article I court in 1988.[166] It sits in Washington, D.C., but may hear cases in any part of the country that the Chief Judge prescribes.[167] The court is not part of the VA.[168] The CAVC has a minimum of three and a maximum of seven judges, including the Chief Judge.[169] The President appoints the judges, on the advice and consent of the Senate solely on "grounds of fitness to perform the duties of the office."[170] There are limits on the political affiliations of the judges, such that if there are seven judges, no more than four may be members of the same political party.[171]

The judges serve for 15 years and may serve more than one consecutive term.[172] The CAVC judges are paid at the same rate as Article III district court judges.[173] They may be removed by the President for "misconduct, neglect of duty, or engaging in the practice of law."[174] The President must provide the reasons for removal and a hearing.[175]

The CAVC's review is based on the record created before the BVA and the Regional Office. It has exclusive jurisdiction over cases decided by the BVA.[176] The CAVC has the power to reverse, modify, or affirm, as appropriate, on all relevant questions of law or constitutional, statutory, and regulatory provisions.[177] It may overturn the BVA's finding of fact if it is "clearly erroneous," with application of the law to be reversed only if arbitrary, capricious, or an abuse of discretion.[178] Cases are heard by a single judge, but the claimant may request a rehearing, either by a panel of three judges, or en banc.[179] Only those cases heard en banc or by a panel have precedential value.[180]

In fiscal years 2007 and 2008, just under 7% of all merits-based decisions were appealed to the Federal Circuit.[181] As appeals may be based only on questions of law, this limits the number of cases before the Federal Circuit, and many are dismissed on jurisdictional grounds.[182] Usually around 10% of appeals decided on the merits are reversed.[183]

There are a number of reasons why the veterans' benefits adjudication system may not provide an apt model for immigration adjudication:

- The process is slow, at both the trial and appellate levels. At the BVA level, it took an average of 155

163 *Id.* § 7101A(e)(2) (referring to 5 U.S.C. § 7521).

164 Board Annual Report, *supra* note 156, at 17.

165 *Id.* at 20.

166 38 U.S.C. § 7251. It was established in 1988 as the U.S. Court of Veterans Appeals, but the Veterans' Programs Enhancement Act of 1998 changed its name to the U.S. Court of Appeals for Veterans Claims. Pub. L. No. 105-368.

167 38 U.S.C. §§ 7255, 7256.

168 *See* CAVC, About the Court, http://www.uscourts.cavc.gov/ (last visited Dec. 24, 2009).

169 38 U.S.C. § 7253(a).

170 *Id.* § 7253(b).

171 *Id.* ("Not more than the number equal to the next whole number greater than one-half of the number of judges of the Court may be members of the same political party.").

172 *Id.* § 7253(c).

173 *Id.* § 7253(e).

174 *Id.* § 7253(f)(1).

175 *Id.* § 7253(f)(2).

176 *Id.* § 7252(a).

177 *Id.* §§ 7252(a), 7261(a)(1).

178 *Id.* §§ 7261(3)-(4).

179 Vet. App. R. 35(c).

180 Verkuil & Lubbers, *supra* note 152, at 766.

181 U.S. Court of Appeals for Veterans Claims, Annual Reports (2008), *available at* http://www.uscourts.cavc.gov/documents/Annual_Report_-_20081.pdf.

182 Verkuil & Lubbers, *supra* note 152, at 768.

183 U.S. Courts, Table B-8, *supra* note 150.

days to process an appeal in FY 2008.[184] A high number of decisions from the BVA are remands back to the original Regional Office — over a third of all cases in FY 2008 — which adds more than a year to the appellate process.[185] At the CAVC level, the median time from filing to disposition is 446 days.[186] This time period has actually increased over the past decade from just under a year.[187]

- There is a very large backlog of cases before the BVA — more than 27,000 claims pending at the end of FY 2008.[188]
- The high remand rates produce a "recycling" of cases. Scholars have argued that the CAVC has failed to protect veterans by stepping in to prevent the "undisciplined pattern of recycling claims."[189]
- There are patterns of action that arguably show that the CAVC is not as independent as it should be. According to one scholar, the CAVC is not independent enough of the VA and the BVA in particular, and so does not rebuke the BVA sufficiently.[190] The CAVC also has been accused of demonstrating "a pattern of benign indecision."[191] It does not use contempt sanctions against the VA, although it could.[192] The court grants extraordinary relief in extremely few cases.[193] Similar to what we have been told about the immigration courts, unrepresented veterans are sanctioned for missing deadlines, but there is no equivalent sanction for VA counsel who miss them.[194] According to some practitioners, the CAVC is afraid to challenge the VA because there is a history of conflicts between the two entities.[195]

Finally, unlike immigration adjudication, the veterans benefits adjudication system is designed to favor the applicants before it. Congress structured the system (at least at the VA) to be claimant friendly. The reason that attorneys do not represent the claimants in the early stages of the benefits system is to ensure that the process remains non-adversarial. The immigration system, by contrast, is more traditionally adversarial. DHS and ICE consider the immigrant to have broken the law in some way, either through the immigrant's status or criminal law, which has led to DHS placing the immigrant in removal proceedings and often also detention.

Arguably, there is not the political will or resources, at least now, to favor immigrants in this way. Yet there are best practices in the veterans benefit system that would undoubtedly help immigrants in presenting their cases in such a way as to aid better decision making as well as due process. For example, the BVA provides a very clear, helpful guide to filing an appeal that is made available to all claimants who experience adverse decisions.[196]

E. Restructuring Proposals for Immigration Adjudication

1. Proposals for an Article I Court

The proposal to create an Article I court for immigration adjudication is not new. Maurice Roberts, a former BIA chair, proposed the idea in a 1980 article, which included a draft statute creating such a court.[197] His proposal was soon echoed by others.[198] In 1981, the Select Commission on Immigration and Refugee Policy, a bipartisan congressional effort, presented a

184 BOARD ANNUAL REPORT, *supra* note 156, at 3.

185 *Id.* at 5.

186 U.S. COURT OF APPEALS FOR VETERANS CLAIMS, *supra* note 181.

187 *Id*.

188 BOARD ANNUAL REPORT, *supra* note 156, at 7.

189 James T. O'Reilly, *Burying Caesar: Replacement of the Veterans Appeals Process Is Needed To Provide Fairness to Claimants*, 53 ADMIN. L. REV. 223, 224 (2001); Verkuil & Lubbers, *supra* note 152, at 770.

190 O'Reilly, *supra* note 189, at 228.

191 *Id.* at 232.

192 *Id.* at 232, 234.

193 U.S. COURT OF APPEALS FOR VETERANS CLAIMS, *supra* note 181; O'Reilly, *supra* note 189, at 234.

194 O'Reilly, *supra* note 189, at 234.

195 *Id.* at 234.

196 U.S. DEPT. OF VETERANS' AFFAIRS, HOW DO I APPEAL? (2002), *available at* http://www.va.gov/vbs/bva/010202A.pdf.

197 Maurice A. Roberts, *Proposed: A Specialized Statutory Immigration Court*, 18 SAN DIEGO L. REV. 1 (1980).

198 *See* Peter J. Levinson, *A Specialized Court for Immigration Hearings and Appeals*, 56 NOTRE DAME L. REV. 644 (1981).

detailed report of recommendations to Congress regarding an overhaul of the immigration system.[199] The report recommended the creation of an Article I immigration court housing both trial and appellate level divisions, with appeal only to the United States Supreme Court.[200] Although several recommendations of the Commission were eventually enacted into law as part of the 1986 Simpson-Mazzoli Immigration Reform and Control Act, the Article I proposal was rejected by Congress.[201] At the time, such a proposal was criticized as taking away meaningful review by a generalist Article III court because the early proposals eliminated circuit court review.[202] Bills creating such a court were tabled in the House of Representatives three times in the 1990s.[203]

In addition, several immigration groups and experts have called for the creation of an Article I court.[204] The National Association of Immigration Judges ("NAIJ") recommends an Article I court with both trial and appellate level judges, with appeal remaining in the circuit courts of appeals.[205] Judges would be appointed by the President with the advice and consent of the Senate.[206] As noted above, the NAIJ recommends using the Tax Court as a model.[207]

Most recently, Appleseed has called for the creation of an Article I court for immigration adjudication in its newly released study on reform of the immigration court system.[208] Appleseed proposes to reconstitute the BIA as the appellate division of a new United States Immigration Court under Article I, and to establish the current immigration courts as the trial division of the new court. To promote impartiality, Appleseed proposes that the federal courts of appeals appoint the appellate division members of the new court,[209] who in turn would appoint a Chief Judge from among themselves. Each appellate judge would have a renewable 15-year term and could be removed only by a majority of the circuit that appointed that judge and only on limited grounds, such as incompetence, misconduct, neglect of duty, or physical or mental disability.

Under the Appleseed proposal, the trial division would be headed by a Chief Immigration Judge appointed by the Chief Judge of the appellate division with the concurrence of the appellate division. Immigration Judges would also be appointed by the Chief Judge of the appellate division "after a rigorous competitive appointment process that is similar to that used to appoint Administrative Law Judges."[210] Current immigration judges would be required to complete the same process as all other candidates, taking into consideration the judge's performance to date. Even if they were not selected, they would be allowed to stay temporarily until permanent judges were hired through the new process.

Once appointed, immigration judges would be "subject to thorough performance reviews by the Chief Immigration Judge, focusing on several 'good judge' factors."[211] An immigration judge could be removed from office by the Chief Judge of the appellate division after considering the Chief Immigration Judge's review.

---

199 *See* Marks, *supra* note 1, at 3; Lawrence H. Fuchs, *Immigration Policy and the Rule of Law*, 44 U. PITT. L. REV. 433, 438 (1983).

200 Fuchs, *supra* note 199, at 442-43.

201 *Id.*

202 Robert E. Juceam & Stephen Jacobs, *Constitutional and Policy Considerations of an Article I Immigration Court,* 18 SAN DIEGO L. REV. 29, 33 (1980); Wildes, *supra* note 10, at 61.

203 United States Immigration Court Act of 1996, H.R. 4258, 104th Cong. (1996); United States Immigration Court Act of 1998, H.R. 4107, 105th Cong. (1998); United States Immigration Court Act of 1999, H.R. 185, 106th Cong. (1999).

204 Marks, *supra* note 1, at 3.

205 *Id.* at 9.

206 *Id.* at 11.

207 *Id.* at 9. Based on conversations with NAIJ officials, we understand that the NAIJ now proposes to allow the government to appeal decisions of the Article I appellate body that are favorable to the noncitizen. Such a feature would be problematic unless accompanied by protections barring detention of the noncitizen during the appeal and providing counsel at government expense to a noncitizen who could not otherwise afford or obtain counsel for the appeal.

208 APPLESEED, *supra* note 6, at 35-36.

209 Each federal circuit would be entitled to appoint a number of members that bears a relationship to the number of Immigration Judges in the circuit, the number of appeals of BIA decisions that come to that circuit "or some other metric that Congress may deem appropriate." *Id*. at 35.

210 *Id.*

211 *Id*. at 36.

Appleseed's rationale for its proposals with respect to the appointment and removal of judges is that the federal courts of appeals have the greatest incentive to appoint competent, unbiased judges to the appellate division and that the Chief Judge of the appellate division would have the greatest incentive to appoint the highest-quality immigration judges in the trial division.[212]

2. Proposals for an Independent Agency

a. In General

The proposal to abolish EOIR and consolidate the immigration judges and the BIA into their own agency is also not new. Earlier versions of the Simpson-Mazzoli Immigration Reform and Control Act called for the creation of a United States Immigration Board, an agency independent from the INS and DOJ and subject to the Administrative Procedure Act.[213] This idea was abandoned after pressure from DOJ.[214]

In a 1997 report presented to Congress, the United States Commission on Immigration Reform, a group chaired by a former Ninth Circuit judge that included practitioners, government officials, academics and others, also recommended creating such an agency.[215] The Commission recommended moving administrative review of all immigration-related decisions to a new independent executive agency, allowing DOJ to focus on enforcement and removal.[216] The Commission viewed this reform as "indispensable to the integrity and operation of the immigration system."[217]

In 2002, NAIJ issued a position paper supporting the creation of an independent agency in the executive branch housing both the immigration courts and the BIA.[218] As with its more recent proposal for an Article I court, NAIJ stated that an independent agency would result in better decision making because of the high level of independence, and would increase the public's perception of the system as fair and impartial.[219]

b. AILA Draft Legislation

After the 2008 presidential election, the American Immigration Lawyers Association ("AILA") submitted draft legislation to the Obama transition team recommending the creation of an independent immigration adjudication agency.[220] AILA's goals with this legislation were to achieve independence, expand resources, and provide the necessary infrastructure for the system.[221] The legislation would create a new agency in the executive branch called the Immigration Court System, containing both appellate and trial level forums.[222]

Under this draft legislation, a Board of Immigration Review would take the place of the BIA.[223] The Board would be led by a Chairperson appointed by the President, with the advice and consent of the Senate, for a non-renewable term of seven years. This person would be responsible for establishing rules and policies to govern the Board and for appointing the remaining members of the Board. The Board would consist of 31 members, including the Chairperson. Board members other than the Chairperson would have unlimited terms. They would have to be attorneys in good standing with at least seven years experience in immigration law. For support, each Board member

---

212 *Id.*

213 Fuchs, *supra* note 199, at 443.

214 *Id.*

215 U.S. Comm'n on Immigration Reform, Becoming an American: Immigration and Immigrant Policy: 1997 Report to Congress (1997).

216 *Id.* at 151-52. This was prior to the creation of DHS.

217 *Id.* at 174.

218 Nat'l Ass'n of Immigration Judges, An Independent Immigration Court: An Idea Whose Time has Come (2002).

219 *Id.* at 11.

220 AILA Draft Immigration Agency Legislation (on file with the American Bar Association Commission on Immigration) [hereinafter AILA Draft Legislation].

221 Interview of Marshall Fitz and Kerri Sherlock Talbot, who were with AILA at the time of the interview.

222 The legislation would create an Office of Administrative Hearings, charged with the same duties as the current Office of the Chief Administrative Hearing Officer, and an Office of Professional Responsibility, charged with managing complaints regarding immigration judges and board members.

223 AILA Draft Legislation, *supra* note 220, § 101(b).

would have at least one senior attorney advisor and at least five attorney law clerks, in addition to the existing staff attorneys who currently serve the BIA.[224]

Board members would rule on cases in three-member panels. The Board could also rule en banc by request of a party or by referral from a panel or the Chairperson. The Board would "ride the circuit" nationwide in order to develop national consistency, educate immigration judges, and meet the appellate needs of litigants. The Board would exercise de novo review over all aspects of immigration judge decisions. Affirmances without opinion ("AWOs") would be allowed only in limited circumstances involving purely administrative matters or where the immigration judge's decision resolved all issues in the case and the case was squarely controlled by precedent and did not challenge such precedent. AWOs would never be permitted in cases involving a denial of asylum, withholding of removal, cancellation of removal, or a claim under the Convention Against Torture.

The Office of Immigration Hearings would house the trial level immigration judges under AILA's proposal.[225] The President would appoint the Chief Immigration Judge, with the advice and consent of the Senate, for a non-renewable term of five years. The Chief Immigration Judge would be responsible for appointing immigration judges, establishing a training program, and developing rules of procedure[226] and rules of conduct. The number of immigration judges would be determined annually by looking at caseload statistics. Immigration judges would be attorneys in good standing with at least seven years of immigration law experience. They would be required to issue timely, written decisions within 60 days of a final hearing for non-detained aliens and within 14 days of the final hearing for detained aliens. A written transcription of an oral decision delivered from the bench could satisfy the writing requirements. Immigration judges also would have contempt authority. Each immigration judge would have one full-time attorney law clerk.

Both the Chairperson of the Board and the Chief Immigration Judge would be assisted by a Standing Referral Committee in appointing new members. The Standing Referral Committee would consist of the Chairperson, the Chief Immigration Judge, the three most senior Board members, and the two most senior immigration judges.[227]

Both Board members and immigration judges would have to participate in regular annual trainings, and would be subject to a competency review within two years of appointment.

We understand that, in drafting this legislation, AILA focused on defining the specific features of an independent body for immigration adjudication, rather than the choice between an independent agency and an Article I court. Accordingly, we view the AILA proposal as an excellent, detailed example of an independent agency model but not one precluding the choice of an Article I model. We have drawn on the AILA proposal in defining the features of an independent agency for immigration adjudication in Section III.A.2 below.

F. Proposals to Have Immigration Judges Be Administrative Law Judges

One way to provide a more professional and independent immigration judiciary at the trial level within an administrative agency is to have immigration judges be Administrative Law Judges ("ALJs") governed by the Administrative Procedure Act ("APA"). The use of ALJs as immigration judges could address a number of problems identified within the existing immigration judge system, which could persist even after the creation of an independent agency, including:

- Vulnerability to political pressure up the chain within the agency;
- The lack of protection from removal without cause;
- Relatively weak protections against transfers, denials of promotion, pay reductions, etc. — or the explicit or implicit threat of such sanctions;
- Some judges' lack of experience and qualifications;
- Political selection and cronyism; and
- Bias, lack of judicial temperament, and lack of professionalism among some judges.

224 Interview of Marshall Fitz and Kerri Sherlock Talbot, *supra* note 221.

225 AILA Draft Legislation, *supra* note 220, § 101(c).

226 Based on the Federal Rules of Civil Procedure. Interview of Marshall Fitz and Kerri Sherlock Talbot, *supra* note 221.

227 AILA is open to expanding the Standing Referral Committee to include external experts such as AILA or the ABA. Interview of Marshall Fitz and Kerri Sherlock Talbot, *supra* note 221.

The Federal Administrative Law Judges Conference ("FALCJ") has identified ten APA provisions that safeguard ALJ independence,[228] and which also tend to promote professionalism:

(1) A merit competitive civil service selection process administered by the Office of Personnel Management ("OPM");

(2) Career permanent civil service appointments without a probationary period;

(3) Pay levels that are set by statute and are not based upon performance;

(4) The requirement of a due process hearing before the Merit Systems Protection Board before an adverse personnel action, such as removal, suspension, reduction in grade, reduction in pay, or a furlough under 31 days, may be taken against an ALJ;

(5) A separate chain of supervisors for ALJs from those who investigate or prosecute cases for the employing agency;

(6) A prohibition of performance evaluations;

(7) A prohibition of bonus pay and honorary awards for accomplishment in the performance of adjudicatory functions;

(8) A prohibition of assignment of duties inconsistent with an ALJ's duties as a judge;

(9) A prohibition of *ex parte* communications with the litigants, including agency officials, regarding the facts at issue in a case; and

(10) The assignment of cases by rotation among the ALJs to the extent practicable.

ALJ applicants also have immunity from liability for their judicial acts.

As discussed in Appendix 6-A of this Report, the Social Security Administration, the National Labor Relations Board, and the Occupational Safety and Health Review Commission all use ALJs to conduct their merits hearings on disability claims, unfair labor practice complaints, and OSHA fines and penalties, respectively. In addition, the Merit Systems Protection Board uses ALJs for some cases, including cases involving adverse actions against an ALJ. However, other agencies do not use ALJs for adjudications; they include the Board of Veterans Appeals, whose cases are similar to the social security disability claims that *are* heard by ALJs in the Social Security Administration.[229] Immigration cases constitute the largest class of adjudications that are not heard by ALJs.[230]

There appears to be no logical rationale for the current differences in staffing adjudicatory hearings by various agencies. Rather, they are simply creatures of the various statutes or regulations creating each adjudicatory system. Adjudications handled by ALJs are identified by statutes (outside the APA) that explicitly require that sections 556 and 557 of the APA apply or call for adjudication "required by statute to be determined *on the record* after opportunity for an agency hearing."[231] No similar statutes govern the adjudications that are *not* heard by ALJs.

In 2005, the ABA Section of Administrative Law and Regulatory Practice ("ADLaw Section") issued a report that classified various types of adjudications as either "Type A" or "Type B." A Type A adjudication is one required by statute to be either determined on the record after opportunity for an agency hearing, or conducted in accordance with sections 556 and 557 of the APA. A Type B adjudication is an agency evidentiary proceeding required by statute that does not qualify as a Type A adjudication. Accordingly, Type A hearings are ordinarily conducted by ALJs while Type B hearings are conducted by "presiding officers."[232] Under this scheme, immigration proceedings in the immigration courts are Type B adjudications.[233]

The ADLaw Section recommended extending some APA provisions to Type B proceedings, including

---

228 Federal Admin. Law Judges Conference, Advancing the Judicial Independence and Efficiency of the Administrative Judiciary: A Report to the President-Elect of the United States 4-5 (2008) [hereinafter FALJC Report].

229 Other types of cases that are not heard by ALJs include those involving some environmental civil penalties, farm credit, public contract disputes, bid protests, and debarment of contractors. *See* ABA Section of Administrative Law and Regulatory Practice, [Untitled Report] 5-6 (2005).

230 *Id.* at 3.

231 *Id.* at 2. Sections 556 and 557 of the APA spell out procedures for hearings and decisions. Under section 556(a), the taking of evidence at an adjudicatory hearing must be presided over by the agency, one or more members of the body comprising the agency, or an ALJ.

232 *Id.* at 1.

233 *Id.* at 3.

decision maker impartiality; independence and separation of functions; the prohibition on ex parte contacts by parties with decision makers; and the requirement of a written or oral decision containing findings and reasons.[234] However, numerous provisions of the APA would continue to be inapplicable to Type B proceedings, including the provisions relating to hiring, compensation, rotation, evaluation, and discharge applicable to ALJs.[235]

In June 2000, the ABA House of Delegates adopted Resolution 113, which was sponsored by the Judicial Division, and set forth criteria Congress should consider in deciding whether a new adjudicatory scheme should employ Type A adjudication.[236] The criteria are:

- Whether the adjudication is likely to involve a substantial impact on personal liberties or freedom, whether the orders carry with them a finding of criminal-like culpability or would have substantial economic effect, or whether the orders involve determinations of discrimination under civil rights or analogous laws;
- Whether the adjudication would be similar to, or the functional equivalent of, a current type of Type A adjudication; and
- Whether the adjudication would be one in which adjudicators ought to be lawyers.

These criteria suggest treating immigration cases as Type A adjudications if Congress were to set up a new system. Others also have suggested that the immigration court system use ALJs.[237]

There are countervailing arguments against using ALJs for immigration cases. First, critics have been dissatisfied with the OPM selection process for ALJs.[238] The OPM process requires agencies to select ALJs from a restricted list of applicants who may not best meet an agency's needs.[239] Since the Social Security Administration hires the vast majority of ALJs, the system is set up primarily to serve that agency's needs.[240] According to FALJC, OPM has taken the position for more than 20 years that the law prohibits an agency from selecting ALJ register candidates on the basis of agency-related experience, a practice known as "selective certification."[241] Instead, an agency must choose new ALJs under the so-called "Rule of Three," which requires the agency to choose from the top three judges on the register regardless of their technical qualifications or experience.[242] The Veterans Preference Act, which gives preference for ALJ positions to qualified veterans, has further restricted agencies' choices.[243]

In August 2005, the ABA adopted a report that found numerous problems with OPM's administration of the ALJ program and recommended that Congress establish the "Administrative Law Judge Conference of the United States," which would take over responsibilities from OPM, including testing, selection, and appointment of ALJs.[244] The report found that OPM had closed its Office of Administrative Law Judges in 2003, dispersed its functions to other divisions, and had otherwise "failed to adequately service the agencies and judges under its mandate."[245] Therefore, the need for a separate agency to manage the ALJ program was prompted by "longstanding problems with OPM's administration of the program."[246] The following specific problems were cited:

---

234 *Id*. at 7-8.

235 *Id*. at 8-9.

236 *See id*. at 11. A second part of the resolution created a default provision that would put newly adopted schemes into Type A unless Congress provided otherwise. *Id.*

237 *E.g.,* Paul R. Verkuil, *Reflections Upon the Federal Administrative Judiciary*, 39 UCLA L. Rev. 1341, 1362-63 (1992).

238 *Id.* at 1360.

239 Jeffrey S. Lubbers, *The Federal Administrative Judiciary: Establishing an Appropriate System of Performance Evaluation for ALJs*, 7 Admin. L.J. Am. U. 589, 617 (1994).

240 Interview with Dan Solomon, National Conference of Administrative Law Judges.

241 FALJC Report, *supra* note 228, at 6.

242 *Id.*

243 *Id.*

244 Nat'l Conference of Admin. Law Judges, Report to ABA on Administrative Law Judge Conference Proposal (2005).

245 *Id*. at 1.

246 *Id.* at 3.

- OPM failed to take steps recommended by the National Conference of Administrative Law Judges to improve relationships between ALJs and their agencies and the lot of ALJs generally, including education for ALJs and their reviewing authorities, administrative leave for education, guidelines for offices, staff support, robes and perks, model procedural rules, standards of conduct, appointment of sufficient judges by agencies, a mini-corps, and an investigation of the SSA and furlough situations and pay issues;
- From 1998 to 2004, agencies were generally unable to hire new judges from the OPM register;
- For many years OPM refused to maintain a continuously open examination for ALJ applicants, and when it finally opened the register continuously, it applied illegal criteria in examining and scoring applicants;
- OPM failed to follow its own regulations concerning priority placement from the ALJ priority referral list; and
- OPM refused to consider adoption of a Code of Judicial Conduct for ALJs.[247]

More recently, in 2008, FALJC supported the ABA's proposal for creating an independent agency to administer the ALJ program after concluding that "OPM has failed to adequately service the agencies and judges under its mandate."[248] FALJC found that beginning in 2003, "OPM systematically has adopted or advocated policies that serve to both undermine the independence of the administrative judiciary and reduce the quality and caliber of ALJs on the register."[249] In addition to the ABA charges in 2005, the following specific criticisms have been made by FALJC in support of its conclusions:

- OPM has taken the position that ALJs are no different than other federal employees and should be covered by a "pay for performance" system that measures performance by agency (i.e., political) goals;
- In March 2007, OPM established a new exam process that replaced criteria for appointment of ALJs with vague criteria and removed the requirement for litigation experience; and
- On a number of occasions, OPM has kept the ALJ exam open for very brief periods of time, which has made it difficult for private sector attorneys to apply.[250]

Apart from OPM's administration, a number of other problems or concerns with the ALJ program have been cited, which cast doubt on the advisability of requiring immigration judges to be ALJs, as follows:

(1) The use of ALJs in the Social Security Administration has not prevented significant disparities in the rates of granting social security disability awards.[251] However, wide disparities also exist in granting asylum among immigration judges, who are *not* ALJs. In fact, after comparing disability adjudication with the New York immigration court, one study found that the results for immigration cases were far less consistent than for SSA disability claims.[252]

(2) The APA requirement for written decisions could increase the time it may take to dispose of immigration cases. The APA requires that the notice of denial of a written application, petition, or other request of an interested person made in connection with an agency proceeding shall be accompanied by "a brief statement of the grounds for denial."[253] However, according to Dan Solomon of the National Conference of Administrative Law Judges, who is an ALJ at the Department of Labor

247 *Id.* at 3-6.

248 FALJC Report, *supra* note 228, at 9.

249 *Id.*

250 *Id.*

251 Sydenham B. Alexander III, *A Political Response to Crisis in the Immigration Courts*, 21 Geo Immigr. L. J. 2, 26 (2006).

252 *Id.* at 26-27.

253 5 U.S.C. § 555(e). No written explanation is required if the notice is merely affirming a prior denial or when the denial is "self-explanatory."

with long experience, the circuit courts of appeals have interpreted the APA to require detailed reasons for each finding.[254] ALJs in the National Labor Relations Board also write detailed decisions comparable to those of federal district judges.[255]

(3) Some members of the Commission have concerns that the ability to remove an ALJ only for good cause is akin to life tenure, which would make it difficult to get rid of judges who perform poorly or have significant problems that do not rise to the level of cause for removal. However, Dan Solomon has noted that some agencies (particularly the Social Security Administration) have, in fact, fired a substantial number of ALJs.[256] Moreover, persons we interviewed have indicated that the ALJ corps throughout the federal government is generally regarded highly, and ALJs are known for their professionalism, dedication, and quality of their work.

(4) The NCALJ has cited problems with the retirement system for ALJs and recommended the establishment of retirement plans appropriate to their judicial status and functions and separate from retirement plans of other career civil servants.[257]

A final concern about requiring immigration judges to be ALJs is how to deal with the existing judges who are not ALJs.

Given the foregoing concerns — particularly the problems with OPM's administration of the ALJ program — we do not at this time recommend requiring new immigration judges to be ALJs as such. However, in order to maximize the independence and professionalism of immigration judges, we incorporate features that employ the ALJ model to the maximum extent possible in defining an independent agency model for immigration adjudication. (*See* Section III.A.2 below.)

III. Evaluation of Options for System Restructuring

In this section, we define the features of each of the three restructuring options, set forth criteria for comparing them, and then describe the relative advantages and disadvantages of each option with respect to these criteria.

A. Features of Each Option

It is theoretically possible to define the features of an Article I court system and an independent agency model almost interchangeably, since there is no clear legal distinction between the two (see Section II.A above). However, we believe that models for restructuring immigration adjudication should draw from existing models for other adjudication systems as much as possible. Accordingly, we define features of an Article I immigration court that resemble existing Article I courts and, similarly, draw from existing independent agencies in constructing the features of an independent agency for immigration adjudication.

The key features that define the three models are the method of selection and qualifications of judges and their tenure, removal, supervision, evaluation, and discipline. The features identified for each option are summarized in Table 6-1 at the end of this Part 6.

1. Article I Court for Entire System

An Article I court for the entire immigration adjudication system would include an Appeals Division and a Trial Division. The leadership of the court would include a Chief Appellate Judge and Chief Trial Judge.

a. Selection of Judges

Article III judges are nominated by the President and confirmed by the Senate, as are the Article I judges who serve on the Tax Court, the Court of Federal Claims,

254 Interview with Dan Solomon, National Conference of Administrative Law Judges.

255 Interview with Ira Sandron, former immigration judge and current member of the Advisory Committee of the ABA Commission on Immigration.

256 Interview with Dan Solomon, National Conference of Administrative Law Judges.

257 Nat'l Conference of Admin. Law Judges, Recommendation and Report on Retirement of ALJs (undated).

and the Court of Appeals for Veterans Claims.[258] NAIJ has proposed a similar appointment system.[259]

However, there are so many immigration judges (more than 200 now and more than 300 if our recommendations for additional resources are implemented) that this method of appointment may be difficult to manage and could easily create a backlog in vacancies. For example, there recently were several vacancies on the much smaller Tax Court, thus raising concern over the ability of the President and Senate to cope with the much larger number of immigration judges.[260] We have considered four alternatives that would avoid this problem, as follows:

(1) The President would appoint, with the advice and consent of the Senate, the Chief Trial Judge, who would appoint the other immigration judges from nominations provided by a standing referral committee, as in the AILA proposal for an independent agency.

(2) The President would appoint both the Chief Trial Judge and the Assistant Chief Trial Judges with Senate confirmation, with the Assistant Chief Trial Judge ("ACTJ") who is responsible for each court appointing the trial judges for that court. Either the Chief Trial Judge or the other ACTJs sitting as a panel would confirm the appointments of trial judges.

(3) A wholly different model would be that of the Bankruptcy Courts, whose judges are appointed by each federal circuit court of appeals.[261] Appleseed cites the bankruptcy model and proposes having the courts of appeals appoint the judges of the appellate division of an Article I court for immigration and having the Chief Judge of the appellate division appoint the trial judges.[262] This method would foster impartiality, judicial independence, and separation of powers by having the judicial branch of government oversee the appointment process. This approach, however, would concentrate power in the Chief Judge of the appellate division and would lack political accountability to the legislative and executive branches. This approach thus may be inconsistent with the judiciary's generally very limited role in immigration and naturalization matters.[263]

The appointment of appellate judges for an Article I immigration court could be handled in a number of ways:

(1) They could be appointed by the President and confirmed by the Senate, as are other federal judges, including Article I judges. As there would be fewer appellate judges than immigration trial judges, this method should not in itself significantly burden the system.

(2) The President could appoint, with the advice and consent of the Senate, the Chief Appellate Judge, who would then appoint the other appellate judges.

(3) The Chief Appellate Judge could select panels of trial judges to serve as appellate judge panels, as in the Bankruptcy Appellate Panel System.

(4) The federal circuit courts of appeals could appoint the appellate immigration judges, as in the Appleseed proposal described above.

After considering the foregoing options, we recommend either the first or second option above for appointment of trial judges and the first option above for appointment of appellate judges. Thus, the President would appoint the Chief Trial Judge, the Chief Appellate Judge, and the other appellate judges, with the advice and consent of the Senate. The Assistant Chief Trial Judges would be appointed either by the President (with Senate confirmation) or by the Chief Trial Judge with the concurrence of the Chief Appellate Judge. The other trial judges would be appointed either: (1) by the Chief Trial Judge; or (2) by the ACTJ responsible for the court in which the vacancy exists, subject to approval of the Chief Trial Judge.

In either case, the appellate and trial judges would be selected from among persons screened and

---

258 28 U.S.C. § 44(a) (federal courts of appeals); 28 U.S.C. § 133(a) (federal district court judges); 26 U.S.C. § 7441(b) (tax court judges); 28 U.S.C. § 171 (federal court of claims); 38 U.S.C. § 7253(b) (veterans appeals).

259 *See* Marks, *supra* note 1, at 1.

260 *Compare* U.S. Tax Court, *supra* note 36 (listing 17 members of the Tax Court) *with* 26 U.S.C. § 7443(a) ("The Tax Court shall be composed of 19 members").

261 28 U.S.C. § 151.

262 *See supra* Section II.E.1.

263 *See* M. Isabel Medina, *Judicial Review — A Nice Thing? Article III, Separation of Powers and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 29 Conn. L. Rev. 1525, 1527 n.8 (1996) (detailing congressional powers over immigration and Supreme Court decisions in which the Court has approved of Congress's granting plenary powers on immigration matters to the Attorney General).

recommended by a Standing Referral Committee. The Committee would include the Chief Appellate Judge, the Chief Trial Judge, the two most senior ranking members of the Appellate Division, and the three most senior ranking ACTJs. The appellate and trial judges appointed to this committee (other than the head of each division) would be replaced by new ones every two years based on next-in-line seniority. Other stakeholders (e.g., DHS, DOJ, and academic and immigration bar groups) would be represented on the Committee or have an opportunity to comment on candidates before they are recommended for appointment.

This approach would provide a balance between the political accountability of the "externally" appointed judges and the internal appointment of trial judges independent of the executive or legislative branches. It also would most closely resemble the method of appointment for other Article I courts, with a necessary change at the trial level to accommodate practical problems created by the large number of judges at that level.

Apart from the method of appointment, the minimum qualifications of candidates also warrants consideration. We recommend that each judge at both the trial and appellate levels be a United States citizen and a member of the bar of any State, the District of Columbia, the Commonwealth of Puerto Rico, or a United States territory, and have a minimum number of years of experience as a licensed attorney or judge involved in litigation or administrative law matters at the federal, state, or local level (e.g., five years for trial judges and seven years for appellate judges). In selecting nominees, the Standing Referral Committee should give particularly strong consideration to candidates who possess a minimum period of experience in the field of immigration law (e.g., five years for trial judges and seven years for appellate judges). Such immigration law experience, however, should not be an absolute requirement, since the goal is to attract lawyers of the highest caliber with the appropriate temperament and demeanor, not necessarily immigration lawyers as such.

b. Tenure

For an Article I immigration court, Congress would define the terms that a judge may serve, as it has done for other Article I courts. Bankruptcy judges serve 14-year terms and may be reappointed on application.[264] Tax Court judges serve 15-year terms,[265] as do judges who sit on the Court of Federal Claims[266] and the United States Court of Appeals for Veterans Claims.[267]

At least one practitioner expressed reservations about fixed terms and argued that they might actually make it easier for attorneys to transition between DHS enforcement and immigration courts.[268] Notwithstanding such concerns, it would appear to be unprecedented to have Article I judges with unlimited terms of office.

Accordingly, we recommend the adoption of fixed terms for the judges of an Article I immigration court at both the trial and appellate levels. The terms should be relatively long like those of Article I judges in other courts, although the terms could be longer for the appellate judges than for the trial level judges. For example, the terms could be in the range of 8 to 10 years for trial judges and 12 to 15 years for appellate judges.

c. Removal

A corollary to fixed terms is the protection of Article I judges from termination for political reasons (or otherwise) without cause during their term. A judge sitting on the Court of Federal Claims may be removed during his or her term only by a majority of the Court of Appeals for the Federal Circuit for "incompetency, misconduct, neglect of duty, engaging in the practice of law, or physical or mental disability."[269] Similarly, Tax Court judges may be removed only by the President after notice and a public hearing and only for reasons of "inefficiency, neglect of

264 28 U.S.C. § 152(a)(1).

265 26 U.S.C. § 7443(e).

266 28 U.S.C. § 172(a).

267 38 U.S.C. § 7253(c).

268 Interview with Professor Nancy Morawetz, head of New York University School of Law Immigrant Rights Clinic.

269 28 U.S.C. § 176(a).

duty, or malfeasance in office."[270] A Bankruptcy judge may be removed only by the court of appeals in the circuit in which the judge serves and only for "incompetence, misconduct, neglect of duty, or physical or mental disability."[271] A judge on the United States Court of Appeals for Veterans Claims may be removed by the President only for "misconduct, neglect of duty, or engaging in the practice of law."[272]

Consistent with these provisions, we recommend that the judges of an Article I immigration court be removable only for incompetency, misconduct, neglect of duty, malfeasance, or physical or mental disability. The judges appointed by the President (the appellate judges, the Chief Trial Judge and the ACTJs, if applicable) would be removable only by the President, while the other trial level judges could be removed by the Chief Trial Judge with the recommendation of the ACTJ who supervises the judge and the concurrence of some group of other ACTJs. Alternatively, a trial judge would be removable by the Chief Appellate Judge, with the concurrence of the appellate division, as in the Appleseed proposal.

d. Supervision and Evaluation

Each trial immigration judge would be supervised by the ACTJ responsible for the local court on which the judge served. Each appellate judge would be supervised by the Chief Appellate Judge.

As Article I judges, neither the trial nor appellate judges would be subject to comprehensive performance reviews of the type used for civil service employees. However, their performance would be reviewed based on a system using the ABA's Guidelines for the Evaluation of Judicial Performance[273] and the model for judicial performance evaluation proposed by the Institute for Advancement of the American Legal System ("IAALS").[274] Such a system is described in detail in Part 2, Section IV of this Report. As discussed there, the system would stress judicial improvement and could not be used for purposes of judicial discipline. The evaluation program would operate through independent, broadly based, and diverse committees that include members of the bench, the bar, and the public. The judges would be evaluated based on legal ability, integrity, impartiality, communication skills, professionalism, temperament, and administrative capacity, but not the merits of their decisions or procedural rulings. The evaluation would utilize multiple, reliable sources, including attorneys, litigants, witnesses, non-judicial court staff, and Article III appellate judges.

e. Discipline

The judges on the Article I court would be subject to a code of ethics and conduct based on the ABA Model Code of Judicial Conduct, tailored as necessary to take into account any unique requirements for the immigration judiciary. They would also be subject to a complaint and disciplinary procedure similar to what is used for other federal judges.[275] Under this procedure, all complaints against immigration judges (at the trial or appellate level), whether from litigants, practitioners, DHS attorneys, other immigration judges, circuit court judges, or others, would be made directly to a reviewing body established specifically for this purpose. The complaints would bypass persons in the chain of supervision (ACTJs and the Chief Trial Judge in the Trial Division and the Chief Appellate Judge in the Appellate Division) to avoid personal conflicts of interest, to ensure equal consideration of all complaints, and to maintain the distinction between the supervisory and disciplinary roles.

The Code of Conduct would be the governing standard, and all complaints should be based on alleged violations of the Code. Complaints relating directly to the merits of an immigration judge's decision or procedural ruling would not be entertained.

The disciplinary body would have authority to investigate complaints, dismiss them, resolve them without adversarial proceedings, or recommend private

---

270 26 U.S.C. § 7441(f).

271 28 U.S.C. § 152(e).

272 38 U.S.C. § 7253(f)(1).

273 ABA, GUIDELINES FOR EVALUATION OF JUDICIAL PERFORMANCE (2005), *available at* http://www.abanet.org/jd/lawyersconf/pdf/jpec_final.pdf.

274 *See* INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., SHARED EXPECTATIONS: JUDICIAL ACCOUNTABILITY IN CONTEXT (2006), *available at* http://www.du.edu/legalinstitute/publications2006.html; INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., TRANSPARENT COURTHOUSE: A BLUEPRINT FOR JUDICIAL PERFORMANCE EVALUATION (2006), *available at* http://www.du.edu/legalinstitute/publications2006.html.

275 *See* 28 U.S.C. §§ 351-364.

or public disciplinary action (subject to the limitations on removal discussed above). The final decision on disciplinary action would rest with the Chief Appellate Judge as to appellate judges and the Chief Trial Judge as to trial judges. A trial judge would have the right to appeal the adverse action to the court of appeals for the circuit in which he presides, while an appellate judge could appeal to the D.C. Circuit.

2. Independent Agency for the Entire System

In defining an independent agency model for immigration adjudication, we have drawn primarily from the Administrative Procedure Act, the AILA proposal discussed in Section II.E.2 above and the practices of existing independent administrative agencies where applicable. The agency would include an Office of Immigration Hearings ("OIH") at the trial level and a Board of Immigration Review ("Board") for administrative appeals. The highest-level officials would be a Chief Immigration Judge ("CIJ") in OIH and a Chairperson of the Board.

a. Selection of Judges

The Chairperson and members of the Board would be appointed by the President with the advice and consent of the Senate. Minimum qualifications would be the same as for Article I court judges, as discussed above. These individuals would be selected from among persons recommended by a Standing Referral Committee. The Committee would consist of the Chairperson of the Board, the CIJ, the two most senior ranking members of the Board, and the three most senior ranking immigration judges. The Board members and immigration judges appointed to this committee would be replaced by new ones every two years based on next-in-line seniority. Other stakeholders (e.g., DHS, DOJ, and academic and immigration bar groups) would be represented on the Committee or have an opportunity to comment on candidates before they are recommended for appointment.

The appointment of Board members by the President, as recommended here, differs from the AILA proposal, under which the Chairperson would appoint the remaining members of the Board from nominations submitted by a Standing Referral Committee. While that approach certainly has merit, we found no precedent for the internal appointment of members at the highest level of an independent adjudicatory agency among the agencies we studied. In each case, the members of the NLRB, MSPB, and OHSCR are appointed by the President with the advice and consent of the Senate. Appointment by the President is also typical for other independent agencies and commissions, such as the Federal Trade Commission, the Interstate Commerce Commission, the Federal Communications Commission, and the Securities and Exchange Commission. Partisanship could be limited by requiring a balance of political affiliations among the appointees and/or specifying that the advice and consent of the Senate must be based "solely on the grounds of fitness to perform the duties of office," as in the Tax Court model.

The Chief Immigration Judge of the OIH also would be appointed by the President, with the advice and consent of the Senate solely on the grounds of fitness to perform the duties of office. As with Board members, the CIJ would be selected from among persons recommended by the Standing Referral Committee.

The remaining immigration judges in the OIH would be hired according to a process similar to the one currently used to hire Administrative Law Judges, but administered through the personnel office of the independent agency rather than the Office of Personnel Management.[276] Like candidates for ALJ positions, new immigration judges would be required to meet the following criteria:

(1) Be licensed to practice law in any U.S. state, the District of Columbia, Puerto Rico, or any territorial court established by the U.S. Constitution;

(2) Have a full seven years of experience as a licensed attorney preparing for, participating in, and/or reviewing formal hearings or trials involving litigation and/or administrative law at the federal, state, or local level;

(3) Cases must have been conducted on the record under formal procedures;

(4) Qualifying litigation experience must involve cases in which a complaint was filed with a court, or a charging document (e.g., indictment or information) was issued by a court, a grand jury, or appropriate military authority;

276 For reasons explained in Section II.F above, we do not at this time recommend requiring new immigration judges in an independent agency to be Administrative Law Judges as such.

(5) Qualifying administrative law experience must involve cases in which a formal procedure was initiated by a governmental administrative body.[277]

In addition, candidates with at least five years of experience in immigration law would receive particularly strong consideration.

Similar to the procedure for hiring new ALJs, OIH would publicly announce the open opportunity to take a competitive examination as the first step in the hiring process.[278] After demonstrating in their written materials that they meet the experience qualifications, candidates would take a written examination and undergo an interview by a panel and an inquiry of their personal references. As with the ALJ examination, the IJ examination would be designed to evaluate the competencies/knowledge, skills, and abilities essential to performing the work of an immigration judge.[279]

Those candidates who score above a predetermined level would be placed on a register of eligible candidates for immigration judge openings. When an opening occurs at one of the immigration courts, the CIJ would hire from among the top candidates on the register.

Implementing a competitive, merit-based appointment process for immigration judges, as described above, would have significant benefits over the current system of hiring:

(1) It would make the process less opaque and political than the current one in DOJ. Instead of relying on a subjective analysis of a candidate's application as the first step in the process, the new process would begin with an objective determination of whether the requisite credentials were present, followed by a standardized testing procedure. Although it would still involve subjective elements such as the interview and the reference research, the test of knowledge and expertise would become part of the hiring process (as opposed to part of the post-hiring training process now employed at DOJ).

(2) Moving to a more competitive, merit-based hiring process should decrease the risk of politically based selections or cronyism.

In these ways, the process for selecting trial judges should help create a more professional immigration judiciary that, over time, should be more comparable to the ALJ corps.

Assistant Chief Immigration Judges ("ACIJs") would either be appointed by the President with advice and consent of the Senate or be selected by the CIJ from among current immigration judges, in either case based on recommendations of the Standing Referral Committee.

b. Tenure

The Chairperson of the Board would be appointed for a single, relatively short term (e.g., five to seven years). At the end of this term, the Chairperson would be eligible to continue to serve the Board as one of its members for a term of similar length.

Other Board members would be appointed for fixed, renewable terms, as is typical in independent agencies and commissions. Among the agencies we studied, the terms are six years (staggered) for members of the Occupational Safety and Health Review Commission, five years for members of the National Labor Relations Board and seven years (non-renewable) for members of the Merit Systems Protection Board. Thus, a term of five to seven years would be in line with this experience and would not exceed the term of the Chairperson.

The Chief Immigration Judge would be appointed for a relatively short term of five to seven years and would be eligible to continue as an immigration judge at the end of this term for a new term of similar length. We suggest the ACIJs also serve for similar terms in that capacity and be eligible for re-appointment.

Otherwise, immigration judges would not be limited to fixed terms. In this respect, they would be treated like ALJs as to their tenure as well as their method of selection. Providing unlimited terms for immigration judges thus would be in furtherance of the goal of professionalizing and de-politicizing the immigration judiciary in an independent agency. Moreover, we are not aware of fixed terms in other independent agencies for trial-level administrative judges who are *not* ALJs.

277 *See* U.S. Office of Personnel Management, Qualification Standard for Administrative Law Judge Positions, http://www.opm.gov/qualifications/alj/alj.asp (last visited Dec. 24, 2009).

278 5 C.F.R. § 930.203. Note, however, that this regulation was amended in 2007 to remove the lengthy description of the hiring process.

279 *Id.*

c. Removal

Members of the Board would be subject to removal prior to the end of their terms by the President for inefficiency, neglect of duty, or malfeasance in office. This standard is similar to standards applicable to removal of members of other independent agencies, boards, and commissions. For example, members of the OSHCR and MSPB may be removed by the President for inefficiency, neglect of duty, or malfeasance in office,[280] while members of the NLRB may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office.[281]

The Chief Immigration Judge (also a Presidential appointee) would be removable by the President under the same standard. The ACIJs could be removed from the position of ACIJ — but not as immigration judges — by the Chief Immigration Judge under the same standard.

Other immigration judges, like ALJs, would be subject to removal only for good cause after an opportunity for a hearing before the MSPB under the same procedures that apply to removal of an ALJ. Any removal would be subject to judicial review.

This removal provision for immigration judges would be consistent with ABA policy, as expressed in Resolution 101B adopted August 6, 2001, which states that "any individualized removal or discipline of a member of the administrative judiciary [shall] occur only after an opportunity for a hearing under the federal or a state administrative procedure act before an independent tribunal, with full right of appeal." In keeping with this resolution, the ADLaw Section in February 2005 proposed that full-time presiding officers in the administrative judiciary shall be removed or disciplined only for good cause and only after a hearing to be provided by the MSPB under the same standards applied to the removal or discipline of ALJs, subject to judicial review. [282]

d. Supervision and Evaluation

In an independent agency, the supervision and evaluation of judges would be similar to the Article I court model. Thus, each immigration judge in the OIH would be supervised by the ACIJ responsible for the local court on which the judge served, while each appellate judge would be supervised by the Chairperson of the Board.

Consistent with their treatment as equivalent to ALJs, immigration judges would be exempt from the use of performance appraisals as a basis for rewarding, reassigning, promoting, reducing in grade, retaining, or removing them.[283] However, such immunity should not be inconsistent with a judicial model of performance review similar to the one proposed for Article I judges, since such reviews cannot be used for disciplinary purposes.

e. Discipline

The independent agency would have a separate office responsible for receiving, reviewing, and investigating complaints filed against Board members and immigration judges. The chief officer of that office would convene panels to review meritorious complaints on a case-by-case basis and refer complaints to such panels. Each review panel would include one Board member and one ACIJ drawn from a random selection process, along with the chief officer, one DHS attorney, and one attorney from the private bar. If a majority of the review panel found a violation of the rules of conduct or other unethical conduct, the chief officer would make a recommendation for disciplinary action to the Chairperson of the Board and the CIJ, who would have final authority to act. However, consistent with the limitations on removal discussed above, any discipline would be subject to review by the MSPB and subsequent judicial review.

3. Hybrid Approach

Proposals for the creation of an Article I court or an independent agency system for immigration cases generally call for both the immigration courts and the BIA to become part of such a system. Another option, however, is to have only the BIA be converted to an Article I court while the immigration courts are placed in an independent administrative agency. The features of this hybrid approach would be a combination of those for the Appellate Division of an Article I court and the Office of Immigration Hearings in an

280 29 U.S.C. § 661(b); 5 U.S.C. § 1201(d).

281 29 U.S.C. § 153(a).

282 Section of Admin. Law and Regulatory Practice, Adjudication Report 9-10 (2005).

283 *See* 5 U.S.C. §§ 4301(2)(D), 4302(a)(3).

independent agency. These features are described in detail in Sections III.A.1 and III.A.2 above and are briefly summarized below.

a. Article I Appellate Court

An Article I "Court of Immigration Appeals" would review decisions of the trial judges housed in the independent agency. The key features of this court would be as follows:

(1) The Chief Appellate Judge and other appellate judges would be appointed by the President with Senate confirmation for relatively long terms (e.g., 12 to 15 years), and could be removed from office during that term by the President only for incompetency, misconduct, neglect of duty, malfeasance, or physical or mental disability.

(2) Each appellate judge would be supervised by the Chief Appellate Judge and would be subject to performance reviews using a system based on the ABA's Guidelines for the Evaluation of Judicial Performance and the model proposed by the Institute for Advancement of the American Legal System.

(3) The judges would be subject to a code of ethics and conduct based on the ABA Model Code of Judicial Conduct, as adapted to the immigration judiciary. They could be disciplined for violations of this code using a disciplinary procedure similar to what is used for other federal judges, as administered by a separate disciplinary body.

b. Independent Trial Level Agency

An "Immigration Review Agency" would hear and decide cases now handled by immigration judges in EOIR. Key features of this agency would be as follows:

(1) The Chief Immigration Judge would head the agency and be appointed by the President with the advice and consent of the Senate solely on the grounds of fitness to perform the duties of office. He or she would be appointed for a relatively short term of five to seven years and would be subject to removal during that term by the President for inefficiency, neglect of duty, or malfeasance in office.

(2) Assistant Chief Immigration Judges would be appointed by the President or selected by the Chief Immigration Judge from among current immigration judges, in either case based on recommendations of a Standing Referral Committee. The Committee would include the Chief Immigration Judge and all ACIJs then in office and would solicit input on candidates from outside stakeholders and experts. The ACIJs would have terms similar to the Chief Immigration Judge and could be removed from the position of ACIJ during that term — but not as an immigration judge — by the Chief Immigration Judge under the same standard that applied to removal of the CIJ.

(3) Immigration judges would be selected using a competitive, merit-based process similar to the one currently used to hire ALJs but administered through the agency's own personnel office. They would serve without term limits and be removable only for good cause after an opportunity for a hearing before the Merit Systems Protection Board under the same procedures as apply to removal of an ALJ, and subject to judicial review.

(4) Immigration judges would be subject to performance reviews using a system based on the ABA's Guidelines for the Evaluation of Judicial Performance and the model proposed by the Institute for Advancement of the American Legal System. The performance reviews could not be used as a basis for training, rewarding, reassigning, promoting, reducing in grade, retaining, or removing an immigration judge.

(5) The immigration judges would be subject to a code of ethics and conduct based on the ABA Model Code of Judicial Conduct, as adapted to the immigration judiciary. The agency would have a separate office responsible for receiving, reviewing, and investigating complaints against a judge based on alleged violations of the code. Any disciplinary action against a judge would be subject to review by the Merit Systems Protection Board.

B. Comparative Analysis

We have compared the three alternative models for restructuring the immigration adjudication system based on the following criteria:

- The relative degree of independence for the judges and their ability to make decisions free of inappropriate pressure or influence;
- Public perceptions of fairness in the system and confidence in the decisions made by the court or agency;

- Ability to attract high quality and competent judges and professionalize the immigration judiciary;
- Efficiency and relative cost and ease of administration;
- Accountability of judges to their superiors and the public; and
- The relative impact on Article III courts.

The comparison is summarized in Table 6-2 and discussed below.

1. Independence

All three models would provide a forum for adjudication that is independent from any executive branch department or agency. An Article I court may be viewed as more independent than an administrative agency since it would be a wholly judicial body. However, the method of selection, unlimited tenure, and protection against removal for immigration judges in the agency model would give them greater independence than in an Article I court (as defined here). The hybrid model combines this type of independence at the trial court level with the more judicial features of an Article I appellate court.

2. Perceptions of Fairness

All three models should increase public confidence in the fairness of immigration adjudication, compared to the current system. As a wholly judicial body, an Article I court is likely to engender the greatest level of confidence in the results of adjudication. The professionalization of the immigration judiciary in an independent agency also would go a long way toward increasing public confidence.

3. Quality of Judges and Professionalism

All three models should attract higher caliber judges and help professionalize the immigration judiciary. The greater prestige of an Article I judicial office may attract more qualified candidates than an administrative judgeship. However, the method of selection, unlimited tenure, and protection against removal without cause in the agency model, which is based on the ALJ system, offers greater job security and a civil service type of process for creating a professional judiciary at the trial court level. The hybrid approach offers a combination of such professionalism at the trial court level and greater prestige at the appellate court level.

4. Efficiency: Relative Cost and Ease of Administration

All three models should make the adjudication system for removal cases more efficient for the reasons set forth in Section I.C of this Part 6. By doing so, they should reduce the total time and cost required to fully adjudicate removal cases and also should reduce costs elsewhere in the system, such as detention costs. The resources needed in terms of judgeships and law clerks also should be similar under all three options. However, the ability to fill and maintain several hundred judgeships at the trial level in an Article I court could be a significant challenge, without precedent in the judiciary; whereas, this can be accomplished in an administrative agency through a civil service type of process similar to the one used to maintain a much greater number of judges in the Social Security Administration.

The cost of establishing and administering a new system should not differ significantly between an Article I court and a new independent agency. The hybrid model is the least cost-efficient option, since it requires the creation and operation of two new distinct institutions.

5. Accountability

To some degree, accountability to the political branches is the flip side of independence. Thus, the trial judges in an Article I court, with fixed terms, generally would be more accountable than those in an independent agency where they would have the equivalent of life tenure. The Article I court thus arguably provides greater balance between independence and accountability than an independent agency would.

6. Impact on Article III Courts

This factor is impacted by independence and perceptions of fairness, since greater independence is likely to lead to greater confidence in results, which in turn is likely to reduce the number of appeals to the circuit courts. To the extent the Article I court may be perceived as more independent and may engender greater confidence than an independent agency, its favorable impact on appeals court caseloads should also be greater.

C. Other Considerations

Advocates of the proposal to establish an Article I immigration court argue that it would enhance judicial independence, efficiency, and fairness.[284] Recent assessments of the current system's shortcomings have made the calls for an Article I court more urgent.[285] Critics of the proposal, however, have argued that current problems with the system will not be solved by an Article I court or, even if they are, the problems and costs resulting from the creation of a new court make its implementation not worthwhile.

1. Additional Arguments in Favor of Article I Court

Immigration judges already make binding decisions in cases or controversies involving individual rights and liberty — a job that is normally assigned to a formal court rather than an administrative agency.

Courts are experienced with providing judgments affecting unpopular or isolated minorities, which those appearing before the immigration courts often are.[286]

The existence of an Article I court may encourage a more uniform development and application of law.

The initial federal court hearing of an immigration claim would be in a court with expertise in immigration issues instead of a generalist court.

2. Arguments Against an Article I Court

Some have pointed out that the agency system serves an important purpose, allowing the development and implementation of policy in accordance with the priorities of the executive branch.[287]

Even Article I courts may not guarantee independence, since their judges may be too sympathetic to the agencies whose decisions they review.[288] Several practitioners stressed that close relationships exist between government attorneys and the judges in other Article I courts because the attorneys consistently appear before the same judges.

Critics have noted that a specialized system like an Article I court would ghettoize the immigration process and further remove it from meaningful judicial review.[289]

IV. Recommendations for System Restructuring

A. Choice Among Options

Although the hybrid option has intellectual appeal, it would be the most complex and costly restructuring option to implement, since it would require the creation and operation of two new and separate institutions. We found no advantages of the hybrid option significant enough to outweigh these major disadvantages. We, therefore, do not recommend the hybrid option, and we focus on the choice between an Article I court or an independent administrative agency for the entire immigration adjudication system.

The key attractions of the independent agency model, as defined here, are: (1) the independence and professionalism that would result from the treatment of trial judges in a manner similar to Administrative Law Judges with respect to selection, tenure, evaluation, and discipline; (2) the agency's ability to fill and maintain a large number of judgeships through a civil service type of process; and (3) the likely perception that an independent agency is a less drastic departure from the current system and one that has many precedents in other independent adjudicatory agencies.

The Article I model is likely to be viewed as more independent than an agency because it would be a wholly judicial body, is likely, as such, to engender the greatest level of confidence in its results, can use its greater prestige to attract the best candidates for judgeships, and offers the best balance between independence and accountability to the political branches of the federal government. Given these advantages, along with the others discussed in Section III.C.1 above, the Article I court model has been selected

---

284 *See* 142 CONG. REC. E1806 (daily ed. Sept. 16, 1996) (remarks by Rep. McCollum, introducing H.R. 4258); Levinson, *supra* note 22, at 650; Marks, *supra* note 1, at 9.

285 *See* Marks, *supra* note 1; Ramji-Nogales et al., *supra* note 1, at 386 (detailing statistically significant disparities between immigration judges' rates of granting asylum in different geographic regions and recommending establishing EOIR as an independent Article I court); Medina, *supra* note 263 (recommending whole immigration adjudication process be removed from DOJ and established as independent Article I court with Article III appellate review).

286 Levinson, *supra* note 22, at 652.

287 Margaret H. Taylor, *Refugee Roulette in an Administrative Law Context: The Déjà Vu of Decisional Disparities in Agency Adjudication*, 60 STAN. L. REV. 475, 480-81 (2007).

288 Legomsky, *supra* note 9, at 1392.

289 Interview with Lee Gelernt, American Civil Liberties Union (ACLU).

as the preferred option. The independent agency model also would be an enormous improvement over the current system and offers a strong alternative if the Article I court is deemed infeasible or unacceptable to Congress and/or the President.

B. Transitional Measures

Since selection, tenure, and removal of the judges of an Article I court would differ significantly from the current system in DOJ, transitional measures would be needed for the existing judges employed by EOIR. We suggest the following:

(1) The Chairman of the BIA would serve as Chief Appellate Judge of the Article I court until replaced by Presidential appointment (with Senate confirmation).

(2) The current members of the BIA would become the appellate judges of the Article I court and would serve out the recommended fixed terms (e.g., 12 to 15 years), which would be deemed to have begun at the time of their prior appointment to the BIA. Thereafter, these judges would be eligible for reappointment by the President with the advice and consent of the Senate.

(3) Any vacancy in the appellate division created by a decision not to reappoint a former BIA member, as well as other vacancies, would be filled by Presidential appointment with Senate confirmation and an opportunity for stakeholder groups to comment on candidates.

(4) The Chief Immigration Judge in EOIR would serve as Chief Trial Judge of the new Article I court until replaced by Presidential appointment (with Senate confirmation).

(5) The current Assistant Chief Immigration Judges in EOIR would serve as Assistant Chief Trial Judges in the Article I court until replaced by the new method of appointment adopted — i.e., either by the President (with Senate confirmation) or by the Chief Trial Judge with the concurrence of the Chief Appellate Judge.

(6) Sitting Immigration Judges in EOIR would be allowed to stay on as trial judges in the new court for the remainder of their fixed terms (e.g., eight to ten years), which would be deemed to have begun when they were first selected as immigration judges in EOIR. At the end of such terms, these judges would be eligible for reappointment through the new system — i.e., by the Chief Trial Judge or by the Assistant Chief Trial Judges for each region (with the approval of the Chief Trial Judge), in either case from recommendations provided by a Standing Referral Committee.[290]

(7) Once appointed to a fixed term through the new system, both appellate judges and trial judges could be removed only for incompetency, misconduct, neglect of duty, malfeasance, or physical or mental disability. The removal power would reside with the party that appointed the judge.

290 As discussed in Section III.A.1.a, *supra,* the Committee would consist of the Chief Appellate Judge, the Chief Trial Judge, the two most senior ranking members of the Appellate Division, and the three most senior ranking ACTJs; and the Committee would provide stakeholders (such as DHS, DOJ, and academic and immigration bar groups) with either representation on the Committee or an opportunity to comment on candidates before recommending them for appointment.

Table 6-1
Features of Major Restructuring Systems

FEATURE	CURRENT SYSTEM	ARTICLE I COURT	INDEPENDENT AGENCY	HYBRID APPROACH
Appointment of Trial Judges	Appointed by Attorney General. Chief Immigration Judge (CIJ) reviews applications and refers candidates to EOIR panels for review. EOIR Director and CIJ select at least 3 candidates to recommend for final consideration. Second panel interviews finalists and recommends one to the AG, who approves or denies. If denied, either AG or Deputy AG can request additional candidates.	President appoints Chief Trial Judge (CTJ) and possibly Assistant Chief Trial Judges (ACTJs) with Senate confirmation. CTJ appoints trial judges; or ACTJ for each region appoints trial judges in that region, with approval of CTJ. Trial judges selected from among persons recommended by Standing Referral Committee.	President appoints Chief Immigration Judge (CIJ) and possibly Assistant Chief Immigration Judges (ACIJs), with Senate confirmation. Alternatively, ACIJs selected by CIJ from among current IJs based on recommendations from Standing Referral Committee. Other trial judges appointed based on merit selection system (including testing) similar to the one now used to hire Administrative Law Judges, but administered by the new agency rather than OPM.	Same as in independent agency model.
Appointment of Appellate Judges	AG has authority to appoint, but it is sometimes delegated.	President appoints Chief Appellate Judge and other appellate judges, with Senate confirmation. Selected from among persons recommended by Standing Referral Committee.	President appoints Chairperson and members of Board of Immigration Review, with Senate confirmation. Selected from among persons recommended by Standing Referral Committee.	Same as in Article I court model.

Table 6-1
Features of Major Restructuring Systems (continued)

FEATURE	CURRENT SYSTEM	ARTICLE I COURT	INDEPENDENT AGENCY	HYBRID APPROACH
Qualifications of Trial Judges	Licensed to practice law in a state, territory or DC; US citizen; at least 7 years of relevant legal experience; at least one year equivalent to GS-15; and either (1) knowledge of immigration law and procedure, (2) substantial litigation experience, (3) experience handling complex legal issues, (4) experience conducting admin. hearings, or (5) knowledge of judicial practices/procedures.	Licensed to practice law in a state, territory, Puerto Rico or DC; US citizen; 5 years of experience as licensed attorney or judge involved in litigation or admin. law matters at federal, state or local level. Strong consideration to candidates with at least 5 years of experience in immigration law.	Licensed to practice in a state, territory, Puerto Rico or DC; US citizen; at least 7 years of experience as licensed attorney preparing for, participating in and/or reviewing formal hearings or trials involving litigation and/or admin. law. Strong consideration to candidates with at least 5 years of experience in immigration law.	Same as in independent agency model.
Tenure of Trial Judges	No fixed term.	Fixed renewable terms of moderate length (e.g., 8-10 years).	CIJ appointed for relatively short term (e.g., 5-7 years). All other judges have unlimited tenure (like ALJs).	Same as in independent agency model.
Tenure of Appellate Judges	No fixed term.	Fixed, relatively long renewable terms (e.g., 12-15 years).	Fixed, relatively short renewable terms (e.g., 5-7 years).	Same as in Article I court model.
Removal of Judges	Removable by AG at any time without cause.	Only for incompetency, misconduct, neglect of duty, malfeasance or disability. Appellate judges, CTJ and possibly ACTJs are removable only by the President. Other trial judges are removable by CTJ on recommendation of the ACTJ for the applicable region and with concurrence of other ACTJs.	Board members and CIJ can be removed by President only for inefficiency, neglect of duty or malfeasance. ACIJs can be removed as ACIJs by the CIJ under same standard. Immigration judges (like ALJs) can be removed only for good cause after hearing before Merit Systems Protection Board (MSPB), subject to judicial review.	Same as Article I model for appellate judges. Same as independent agency model for trial judges.

Table 6-1
Features of Major Restructuring Systems (continued)

FEATURE	CURRENT SYSTEM	ARTICLE I COURT	INDEPENDENT AGENCY	HYBRID APPROACH
Supervision and Evaluation	CIJ is responsible for supervision of immigration judges, with assistance of ACIJs. IJs are exempt from performance appraisals applicable to other civil service employees, but subject to caseload review. EOIR and NAIJ are negotiating performance review system.	Trial judges supervised by their local ACTJ. Appellate judges supervised by Chief Appellate Judge. Performance reviews based on ABA Guidelines for Evaluation of Judicial Performance and model for judicial performance evaluation proposed by Institute for Advancement of the American Legal System. System stresses improvement and cannot be used for discipline.	Similar to Article I court model. Performance reviews are used to promote improvement and cannot be used as basis for rewarding, reassigning, promoting, reducing in grade, retaining or removing an Immigration Judge.	Same as Article I court model for appellate judges. Same as independent agency model for trial judges.
Discipline	Immigration judges subject to multiple codes of conduct and ethics. Complaints filed with ACIJ and forwarded to Office of CIJ. Assistant Chief Judge for Conduct and Professionalism reviews all complaints and allegations of misconduct. EOIR may refer complaints to DOJ Office of Professional Responsibility or Office of Inspector General.	Judges subject to code of ethics and conduct based on ABA Model Code of Judicial Conduct and complaint procedure similar to what is used for other federal judges.	Agency would have separate office responsible for receiving, reviewing and investigating complaints against Board members and IJs. Discipline subject to review by MSPB and subsequent judicial review.	Same as Article I court model for appellate judges. Same as independent agency model for trial judges.

Table 6-2
Comparison of Major Restructuring Options

CRITERIA	ARTICLE I COURT	INDEPENDENT AGENCY	HYBRID APPROACH
Independence	Viewed as more independent because it is a wholly judicial body.	Method of selection, unlimited tenure and protection against removal for trial judges gives them greater independence than judges on a court.	Combines independence of trial judges with more judicial features at the appellate level.
Perceptions of Fairness	Likely to engender greatest level of confidence, as a wholly judicial body.	Professionalization of the immigration judiciary at trial judge level should increase public confidence.	Combines confidence derived from professionalization at trial level with confidence in judicial body at appellate level.
Quality of Judges and Professionalism	Greater prestige of Article I court judgeship may attract more qualified candidates.	Method of selection, unlimited tenure and protection against removal offers greater job security to trial judges.	Combines greater job security at trial judge level with greater prestige of a court at appellate level.
Efficiency, Cost and Ease of Administration	Ability to fill and maintain several hundred judgeships at trial court level could be significant challenge.	Can fill and maintain trial judge positions through proven civil service type of process.	Most costly option, requires creation and operation of two new distinct institutions.
Accountability	Trial judges with fixed terms will be more accountable to the President and Congress.	Trial judges chosen by merit system with unlimited tenure will have little or no accountability to the political branches.	Combines little or no accountability to the political branches at trial judge level with greater accountability at appellate level.
Impact on Article III Courts	Greater independence and perceptions of fairness could result in fewest appeals to circuit courts.	Should reduce the number of appeals to circuit courts, but possibly not as much as Article I court.	Impact should be somewhere between independent agency and Article I court.

Appendix 6-A: Other U.S. Adjudication Systems

Reforming the Immigration System

Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases

Prepared by Arnold & Porter LLP for the American Bar Association Commission on Immigration

American Bar Association
Commission on Immigration
740 Fifteenth Street, NW
Washington, DC 20005-1022
202-662-1005

Appendix 6A: Other U.S. Adjudication Systems
Table of Contents

I. Article I Courts....6A-3
A. United States Tax Court....6A-3
B. Court of Federal Claims....6A-5
C. Bankruptcy Courts....6A-7
II. Administrative Agencies for Adjudication....6A-7
A. Occupational Safety and Health Review Commission....6A-7
B. National Labor Relations Board....6A-10
C. Merit Systems Protection Board....6A-13
D. The Social Security Administration....6A-16
III. Hybrid System for Veterans' Appeals....6A-17
A. Structure: Bodies, Members and Procedures....6A-17
1. The Board of Veterans Appeals....6A-18
2. The United States Court of Appeal for Veterans Claims....6A-19
B. Caseload....6A-20
C. Results....6A-21
D. Representation....6A-21
E. Applicability of the Veterans' Benefits Hybrid Model....6A-22
COMMON ACRONYMS....AG-1
GLOSSARY OF TERMS....AG-3

Appendix 6A: Other U.S. Adjudication Systems

This Appendix sets forth our research on comparative United States adjudication systems that handle matters other than immigration. We studied both Article I courts and agency adjudication systems. We studied three Article I courts separately: the United States Tax Court, the Court of Federal Claims, and the federal Bankruptcy Courts. The agency systems we reviewed include the Occupational Health and Safety Review Commission, the National Labor Relations Board, the Merit Systems Protection Board, and the Social Security Administration. Finally, we studied a hybrid system of adjudication for veterans' claims, which includes the Board of Veterans Appeals at the agency level and the Court of Appeals for Veteran Claims as an Article I court.

Some of this research is included in the Report's Part 6: System Restructuring, but is repeated here for completeness.

I. Article I Courts

A. United States Tax Court

The United States Tax Court provides a place for the taxpayer to dispute a tax deficiency as determined by the Internal Revenue Service ("IRS").[1] Although taxpayers may also bring actions in the Court of Federal Claims or a federal district court, the taxpayer must pay the tax first in order to use those venues, which is not a requirement in the Tax Court.[2] The Tax Court exercises only judicial power and makes decisions solely on cases before it; it has no administrative or legislative powers.[3]

The Tax Court's principal location is Washington, D.C., but it sits in various designated cities for the purposes of trial.[4] The statute specifies that the Chief Judge of the Court shall select places for the Court to hold trial "with a view to securing a reasonable opportunity for taxpayers to appear before the court with as little inconvenience and expense as is practicable."[5]

The Tax Court consists of 19 judges who are appointed by the President, with the advice and consent of the Senate "solely on the grounds of fitness to perform the duties of office."[6] Thus, all judges have expertise in tax law.[7] The judges serve 15-year terms and are eligible for reappointment, but face mandatory retirement at age 70.[8] Prior to age 70, a judge may elect to receive "retirement pay" upon retirement, which, as in the district court and the Court of Federal Claims, continues for the duration of the judge's life.[9] Retired judges are eligible for recall for service on the Court as a "senior judge."[10] The judges are paid at the same rate and same manner as district court judges.[11] The judges designate one judge to serve as Chief Judge biannually.[12] Judges are removable by the President, after notice and opportunity for public hearing, only for "inefficiency, neglect of duty, or malfeasance in office, but for no other cause."[13]

The Tax Court has promulgated its own rules of practice and procedure, which are adopted from the Federal Rules of Civil Procedure and have the force and effect of law.[14] For evidence, the Court has adopted the rules used in non-jury civil trials in the United States District Court for the District of Columbia, which are a

---

1 United States Tax Court, About the Court, http://www.ustaxcourt.gov/about.htm (last visited Dec. 24, 2009); *see also* 26 U.S.C. § 7442.

2 26 U.S.C. § 7422(e); Flora v. United States, 357 U.S. 63 (1958).

3 Deborah A. Geier, *The Tax Court, Article III, and the Proposal Advanced by the Federal Courts Study Committee: A Study in Applied Constitutional Theory*, 76 CORNELL L. REV. 985, 995 (1991).

4 26 U.S.C. § 7445; United States Tax Court, *supra* note 1; *see also* United States Tax Court, Places of Trial, http://www.ustaxcourt.gov/dpt_cities.htm (last visited Dec. 24, 2009) (listing trial locations).

5 26 U.S.C. § 7446.

6 *Id.* § 7443.

7 United States Tax Court, *supra* note 1.

8 26 U.S.C. §§ 7443, 7447.

9 *Id.* § 7447(d)-(e).

10 *Id.* § 7447(c).

11 *Id.* § 7443(c)(1).

12 *Id.* § 7444(b).

13 *Id.* § 7443(f).

14 *Id.* § 7453; U.S. TAX COURT, RULES OF PRACTICE AND PROCEDURE, *available at* http://www.ustaxcourt.gov/notice.htm.

relaxed version of the Federal Rules of Evidence.[15] In the case of a gap in the rules, the Court turns to the Federal Rules of Civil Procedure.[16]

A Tax Court case begins with the filing of a petition by a taxpayer after receiving a notice of determination or notice of deficiency from the IRS.[17] The IRS Commissioner then has 60 days to answer.[18] Cases are set for trial before a judge as soon as practicable.[19] Most cases settle before trial.[20] If the case does proceed through a complete trial, the judge will typically issue a report setting forth findings of fact and opinion, but may do this orally as well.[21]

Appeals go to the federal court of appeals for the circuit where the taxpayer resides or where the corporate taxpayer has its principal place of business.[22] The period for filing an appeal is 90 days; after that, the decision of the Tax Court becomes final.[23] The standard of review is the same as in appeals from district court decisions tried without a jury[24] — "clearly erroneous" for findings of fact, de novo review for legal questions and abuse of discretion for discretionary actions by trial judges.[25] The Tax Court will follow the precedent of the circuit to which appeal lies from a decision.[26]

The Tax Court was created by the Tax Reform Act of 1969.[27] There is very little legislative history of the provision creating the Court, but the history that does exist focuses on the change from an administrative agency to an Article I court.[28] The Court is the successor to the Board of Tax Appeals, an agency that operated independently of the Bureau of Internal Revenue, the predecessor to the IRS, and the Treasury.[29] This independence was important to achieving "as equitable a review of tax liabilities as possible."[30] Like the current Tax Court, the Board of Tax Appeals had no policymaking or regulatory powers.[31]

The Tax Court is not perceived as having a pro-government or pro-taxpayer bias. Indeed, "[s]ince litigants have the option of avoiding the court if they distrust it, its substantial case load [over 90% of tax cases filed] supports its neutrality."[32] Practitioners also generally view the Court as neutral.[33] The background of the judges reflects this neutrality — in 1995, 9 of the 15 came from the private sector, with the remaining judges coming from government positions.[34]

Although we were unable to find statistics regarding reversal rates of Tax Court decisions on

---

15 26 U.S.C. § 7453.

16 TAX CT. R. 1(a).

17 *See* 26 U.S.C. § 6015.

18 *Id.*

19 United States Tax Court, *supra* note 1. There is no right to jury trial in the Tax Court. *See* Statland v. United States, 178 F.3d 465 (7th Cir. 1999).

20 United States Tax Court, *supra* note 1.

21 *Id.* The Court also employs special trial judges to preside over "small tax cases" for claims involving $50,000 or less. This proceeding is less formal and proceeds quickly. Neither briefs nor oral argument are required. There is no right of appeal in such cases. Decisions in these matters are not considered precedential. *See* 26 U.S.C. § 7443A; TAX CT. R. 3(d). Because these proceedings are not analogous to immigration adjudication, we chose not to explore them in detail.

22 26 U.S.C. § 7482(a).

23 *Id.* §§ 7481(a)(1), 7483.

24 *Id.* § 7482(a).

25 *See* Johanson v. Comm'r of Internal Revenue, 541 F.3d 973, 967 (9th Cir. 2008) (construing 26 U.S.C. § 7482(a)); Wheeler v. Comm'r of Internal Revenue, 521 F.3d 1289, 1291 (10th Cir. 2008) (same); Green v. Comm'r of Internal Revenue, 507 F.3d 857, 866 (5th Cir. 2007) (same); Comm'r of Internal Revenue v. Dunkin, 500 F.3d 1065, 1068 (9th Cir. 2007) (abuse of discretion).

26 Golson v. Commissioner, 52 T.C. 742, 756-58 (1969), *aff'd*, 445 F.2d 985 (10th Cir. 1970).

27 Geier, *supra* note 3, at 986-87.

28 *Id.*

29 17 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4102 (2008).

30 *Id.*

31 *Id.*

32 Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329, 336-37 (1991).

33 David Laro, *The Evolution of the Tax Court as an Independent Tribunal*, 1995 U. ILL. L. REV. 17, 24-25 (1995).

34 *Id.* at 25.

appeal, in general, the circuit courts are deferential to Tax Court decisions, in part because of the complexity of the law involved.[35]

B. Court of Federal Claims

The Court of Federal Claims ("CFC") was created via the Federal Courts Improvement Act of 1982, the same statute that created the Court of Appeals for the Federal Circuit.[36] The CFC's creation was primarily a restructuring of the previous existing trial functions of the Court of Claims.[37] The CFC's jurisdiction is defined by the Tucker Act and covers "any claim against the United States founded either under the Constitution, or any act of Congress or any regulation of an executive department, or any express or implied contract with the United States [except] cases [] sounding in tort."[38] Other statutory provisions have extended the CFC's jurisdiction to additional specified areas.[39] The jurisdiction of the CFC is actually quite broad compared to other Article I tribunals, and extends to disputes involving tax claims, government contracts, Constitutional takings, civilian and military pay, intellectual property, vaccine injury cases, and claims by Native American tribes.[40]

The principal office of the CFC is located in Washington, D.C., but, by statute, the CFC may hold court "at such times and in such places as it may fix by rule of court."[41] The CFC is treated like a district court for budgetary and support service purposes.[42]

CFC judges are appointed by the President with the advice and consent of the Senate.[43] The President also designates one judge to serve as Chief Judge.[44] The background of the judges varies, but most have some connection to the federal government.[45] Judges serve for terms of 15 years and are eligible for reappointment.[46] Most judges, however, opt to take senior judge status, which allows the judge to "retire" but continue serving the court while receiving an annuity equal to the salary of CFC judges.[47] CFC judges, similar to Article III judges, continue to receive this payment for the remainder of their lives.[48] Although only 16 judges officially serve on the CFC, there are a number of senior judges due to this rule.[49]

A judge sitting on the CFC may be removed only by a majority of the Court of Appeals for the Federal Circuit during his or her term for "incompetency, misconduct, neglect of duty, engaging in the practice of law, or physical or mental disability."[50] A judge subject

---

35 Bruff, *supra* note 32, at 337.

36 Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (1982).

37 Richard A. Seamon, *The Provenance of the Federal Courts Improvement Act of 1982*, 71 GEO. WASH. L. REV. 542, 546 (2003). Prior to 1982, the court consisted of 15 commissioners who were authorized to make recommendations and conclusions of law, which were then reviewed by five judges for issuing of a final decision. United States Court of Federal Claims, United States Court of Federal Claims: The People's Court, http://www.uscfc.uscourts.gov/sites/default/files/court_info/Court_History_Brochure.pdf (last visited Dec. 24, 2009).

38 28 U.S.C. § 1491(a)(1).

39 *See, e.g., id.* § 1496 (jurisdiction over any claim by a disbursement officer of the United States).

40 United States Court of Federal Claims, About the Court, http://www.uscfc.uscourts.gov/about-court (last visited Dec. 24, 2009).

41 28 U.S.C. § 173.

42 Loren A. Smith, *Why a Court of Federal Claims?*, 71 GEO. WASH. L. REV. 773, 776-77 (2003).

43 28 U.S.C. § 171(a).

44 *Id.* § 171(b).

45 Smith, *supra* note 42, at 786.

46 28 U.S.C. § 172(a).

47 *Id.* § 178(a); Steven L. Schooner, *The Future: Scrutinizing the Empirical Case for the Court of Federal Claims*, 71 GEO. WASH. L. REV. 714, 747 (2003). To be eligible, a judge's age plus his/her years of service must equal 80. There are exceptions made in cases of disability.

48 Schooner, *supra* note 47, at 747-48. Dean Schooner notes that "despite the fact that the CFC is not an Article III court, life tenure has become a distinction in form, not substance."

49 Court of Federal Claims, Judges Biographies, http://www.uscfc.uscourts.gov/judges-biographies (last visited Dec. 24, 2009). There are currently eight senior judges. *Id.*

50 28 U.S.C. § 176(a).

to removal has an opportunity to be heard on the charges.[51] A removed judge is subsequently barred from practicing before the CFC.

A case begins before the CFC when a claim is filed with the court.[52] The filing party must also serve a copy of the complaint on the United States,[53] which has 60 days to answer.[54] The adversary is always the government, represented by Department of Justice lawyers; however, because the CFC is independent of any other agency or body, the adversary is institutionally separate from the court itself. Cases are assigned to a judge at random, and the judge sets the case for trial.[55] Discovery is similar to that in the federal district courts.[56] Appeal lies solely with the Court of Appeals for the Federal Circuit.[57] Filing an appeal is done in the same way as filing an appeal from a decision of a district court.[58]

The recent reversal rates of opinions from the CFC at the Federal Circuit were 8% in 2008, 14% in 2007, 19% in 2006, 12% in 2005, and 11% in 2004.[59] These reversal rates are comparable, although perhaps not as consistent, as the rate for circuit court reversals of district court civil decisions in cases in which the United States was a party. That reversal rate was 12.3% for the fiscal year ending in 2008, 11.8% in 2007, 11.5% in 2006, 11.1% in 2005, and 12.1% in 2004.

The rationale behind the creation of the CFC was to create a national court that could handle cases throughout the country in specific, important subject areas and develop a national uniform body of law in these areas.[60] The court has been criticized because of its failure to be a real "specialist" court, as its jurisdiction is fairly wide.[61] It has generally not been criticized, however, for having a particular political bent, even by those critical of the court.[62] Changes in structure to the court have been based more on disagreements over the court's jurisdictional powers than any independence critique.[63]

The CFC does, however, have problems related to its status as an Article I court. It is, in the words of one commentator, still under funded and under resourced. Judge Bruggink, currently a senior judge on the court, noted that there is "[a] lack of any clear location for the court in the Government's organizational chart," resulting in a lack of support from the Administrative Office of the Courts.[64]

---

51 *Id.* § 176(b).

52 FED. CL. R. 3, *available at* http://www.uscfc.uscourts.gov/sites/default/files/court_info/rules_071309_v8.pdf. The Court of Federal Claims has statutory power to promulgate its own rules based on the Federal Rules of Civil Procedure. *Id.*

53 FED. CL. R. 4.

54 FED. CL. R. 12.

55 FED. CL. R. 40.1, 40.

56 FED. CL. R. 26.

57 28 U.S.C. § 1295(a)(3).

58 *Id.* § 1522.

59 Statistics available at U.S. Courts, http://www.cafc.uscourts.gov (last visited Dec. 24, 2009).

60 United States Court of Federal Claims, *supra* note 37; Smith, *supra* note 42.

61 Schooner, *supra* note 47, at 717-21.

62 Schooner, *supra* note 47,at 748-49, noting that "nothing suggests that politics play a greater or lesser role in the selection of CFC judges, when compared to their district court counterparts. Nor is there any unique reason to suggest that the judges' political predilections unduly dominate their work once appointed. If anything, the facts lead to the opposite conclusion."

63 *See* C. Stanley Dees, *The Future of the Contract Dispute Act: Is it Time to Roll Back Sovereign Immunity?*, 28 PUB. CON. L.J. 545, 545-56 (1999). The legislative history of the act creating the most recent iteration of the court, the Federal Courts Improvement Act, indicates that Congress gave little attention to the reasons behind creating the court other than as a needed place for trial level adjudication of cases that would be appealed to the Court of Appeals for the Federal Circuit, the focus of the act. *See* Seamon, *supra* note 37, at 575-77. Congress did, however, briefly discuss the benefits of replacing commissioners, who were unable to make a final judgment, with judges, who could do so, decreasing duplication of efforts and encourage settlement. *Id.* at 576.

64 Eric Bruggink, *A Modest Proposal*, 28 PUB. CON. L.J. 529, 542 (1999). Judge Bruggink noted that the CFC courthouse lacked enough physical space for both adequate judicial chambers and courtrooms.

C. Bankruptcy Courts

The bankruptcy courts are contained within the judiciary, and they are, effectively, Article I extensions of Article III courts.[65] This analysis does not review the specifics of Bankruptcy Court process but identifies some features that are informative.

Appointment, for example, works differently in the bankruptcy courts than in other Article I courts. Bankruptcy judges are appointed and removed by the judges in the federal court of appeals in the circuit in which they serve.[66] This method fosters judicial independence and separation of powers by having the judicial branch of government oversee the appointment process. Bankruptcy judges are removable only for "incompetence, misconduct, neglect of duty, or physical or mental disability."[67]

Bankruptcy courts are also unique in the handling of appeals. Certain federal circuits have formed Bankruptcy Appellate Panels, consisting of three bankruptcy judges, appointed by the circuit court, hearing appeals from the bankruptcy courts.[68] Most bankruptcy decisions, however, are appealed to the district courts and then upward.[69]

II. Administrative Agencies for Adjudication

A. Occupational Safety and Health Review Commission

The Occupational Safety and Health Administration ("OSHA") is a federal agency within the Department of Labor that is responsible for setting workplace safety and health standards and for inspecting work places to enforce compliance with its standards.[70] OSHA was created by the Occupational Safety and Health Act of 1970 ("OSH Act").[71] Under the statute, Congress granted OSHA extensive powers to ensure a safer and healthier workplace for millions of Americans.[72]

Congress also designed a check on this power by establishing the Occupational Safety and Health Review Commission ("OSHRC") as a federal agency that is independent from OSHA[73] and the Department of Labor.[74] OSHRC provides administrative trial and agency-head review of contested citations and penalties resulting from inspections by OSHA.[75] The separation of adjudicatory functions from rulemaking and enforcement functions, as is used with OSHA and

---

65 Bankruptcy courts were created in 1978 as Article I courts, but Congress had to reenact the courts' legislation after the Supreme Court found that Congress had unconstitutionally conferred Article III powers on Article I bankruptcy courts. *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982); 13 CHARLES A. WRIGHT & MARY KAY KANE, HORNBOOK ON THE LAW OF FEDERAL COURTS § 3508 (6th ed. 2002). Nonetheless, the courts function as part of Article III district courts. The U.S. Code states: "In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district." 28 U.S.C. § 151. The Federal Judiciary's own website describes bankruptcy courts as Article III courts, and lists separately the Tax Court and Court of Federal Claims. *See* U.S. Courts, About U.S. Federal Courts, http://www.uscourts.gov/about.html (last visited Dec. 24, 2009). Similarly, the Administrative Office of the U.S. Courts provides services to bankruptcy judges along with circuit court, district court, and magistrate judges — but not to the Tax Court. *See* U.S. Courts, Administrative Office Services, http://www.uscourts.gov/ao/services.htm (last visited Dec. 24, 2009). Therefore, although bankruptcy courts are technically Article I courts, they function as a limited jurisdictional unit within an Article III district court.

66 28 U.S.C. § 151 (hiring); *id.* § 152(e) (removal).

67 *Id.* § 152(e).

68 Appeals go to the Bankruptcy Appellate Panel in the First, Sixth, Eighth, and Ninth Circuits. Even when a panel exists, participants can elect to have their appeal go to a district judge instead. *See* 28 U.S.C. § 158(b); U.S. ATTORNEY'S CIVIL RESOURCE MANUAL, BANKRUPTCY JURISDICTION, *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title4/civ00190.htm#2. After the panel decision, cases are appealed to the Circuit Courts.

69 *See* 28 U.S.C. § 158(a).

70 U.S. Occupational Safety and Health Review Commission, Freedom of Information Act, http://www.oshrc.gov/foia/foia.html (last updated Aug. 19, 2008).

71 U.S. Occupational Safety and Health Review Commission, About OSHRC, http://www.oshrc.gov/about/how-oshrc.html (last updated Apr. 13, 2006).

72 H.R. REP. No. 108-488 (2004), *available at* http://thomas.loc.gov/cgi-bin/cpquery/?&sid=cp108HB38w&refer=&r_n=hr488p1.108&db_id=108&item=&sel=TOC_2096&.

73 H.R. REP. No. 109-50 (2005), *available at* http://thomas.loc.gov/cgi-bin/cpquery/T?&report=hr050&dbname=109&.

74 2 GUIDE TO EMPLOYMENT LAW AND REGULATION § 18.1 [rule 6.2 (c)] (2009).

75 U.S. Occupational Safety and Health Review Commission, Home, http://www.oshrc.gov (last updated Dec. 14, 2009).

OSHRC, has been referred to as the "split-enforcement" model.[76]

OSHRC is a quasi-judicial, independent administrative agency comprised of three presidentially appointed commissioners who serve staggered six-year terms.[77] Unlike some statutes governing other federal agencies, the OSH Act contains no requirements regarding the political party balance of the commission members.[78] Two members of OSHRC constitute a quorum, and official action may be taken on the affirmative vote of two members.[79] The President designates one of the three members as the chairman, who is responsible for the administrative operations of OSHRC. The chairmanship may be changed by the President at any time.[80] Commissioners, however, may only be removed from office by the President for inefficiency, neglect of duty, or malfeasance in office.[81]

The principal office of OSHRC is located in the District of Columbia. However, OSHRC is permitted to hold meetings and conduct proceedings in other locations when it is in the best interest of the public or the parties involved, or where such change in location would minimize the expense associated with such proceeding.[82] Each official act of OSHRC must be entered on the record, and its hearings and records must be open to the public.[83]

Before a dispute can be heard by the three commissioners, it is typically first heard by an ALJ. The chairman of OSHRC is responsible for appointing the ALJs. Like ALJs in other administrative agencies, those at OSHRC have unlimited tenure, may be removed only for good cause or reductions in force, and are subject to the laws governing employees in the classified civil service.[84]

OSHRC promulgates its own procedural rules that are used in conjunction with the Federal Rules of Civil Procedure, the Federal Rules of Evidence, and the APA.

OSHA issues regulations that set occupational safety and health standards that an employer must follow. To ensure that these standards are being followed, OSHA conducts inspections of workplaces under its jurisdiction.[85] If OSHA's inspectors find what they believe to be unsafe or unhealthy working conditions, they may issue a citation to an employer.

If the cited employer, an employee, or an employee representative disagrees with the OSHA inspector's determination, they may file a notice of contest with the Secretary of Labor within 15 working days of receiving the citation.[86] The Secretary of Labor then transmits the notice of contest and all relevant documents to OSHRC for filing and docketing.[87]

After the case is docketed, it is forwarded to the Office of the Chief ALJ for assignment to one of the 12 ALJs.[88] The case is generally assigned to an ALJ in the OSHRC office closest to where the alleged violation occurred.[89] The assigned ALJ will then schedule a hearing in a community as close as possible to the employer's worksite. However, approximately 90% of

---

76 *See* Richard H. Fallon, Jr., *Enforcing Aviation Safety Regulations: A Case for the Split-Enforcement Model of Agency Adjudication*, 4 ADMIN. L.J. AM. U. 389, 392 (1991); Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1135 (1990); Paul R. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 DUKE L.J. 257, 268-69 (1988); George Robert Johnson, Jr., *The Split-Enforcement Model: Some Conclusions from the OSHA and MSHA Experiences*, 39 ADMIN. L. REV. 315, 315 (1987).

77 29 U.S.C. § 661(a),(b); 3 WEST'S FEDERAL ADMINISTRATIVE PRACTICE § 2502 (3d ed. 2008).

78 29 U.S.C. § 661(a); Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1139 (2000). This, of course, does not prevent Congress from acting as if it does.

79 61 AM. JUR. 2D PLANT AND JOB SAFETY § 85 (2008).

80 MARK A. ROTHSTEIN, OCCUPATIONAL SAFETY AND HEALTH LAW § 16:1 (2009).

81 29 U.S.C. § 661(b).

82 *Id.* § 661(d).

83 *Id.* § 661(g).

84 *Id.* § 661(k).

85 U.S. Occupational Safety and Health Review Commission, Guide to Review Commission Procedures (Aug. 2005), http://www.oshrc.gov/publications/procedures.html.

86 29 U.S.C. § 659(b); OCCUPATIONAL SAFETY & HEALTH REVIEW COMM'N, FISCAL YEAR 2009 PERFORMANCE BUDGET AND JUSTIFICATION (2008), *available at* http://www.oshrc.gov/budget/fy09_budget.htm.

87 29 U.S.C. § 659(c).

88 OCCUPATIONAL SAFETY & HEALTH REVIEW COMM'N, *supra* note 86. OSHRC's Office of Administrative Law Judges anticipated having 25 full time employees in 2009. This number includes the 12 ALJs, as well as staff attorneys and support staff.

89 OSHRC's central office is in Washington, D.C., and it also has regional offices in Atlanta and Denver. OCCUPATIONAL SAFETY & HEALTH REVIEW COMM'N, *supra* note 86; U.S. Occupational Safety and Health Review Commission, *supra* note 71; ROTHSTEIN, *supra* note 80, at § 16:2.

all contested cases are disposed of without a hearing, as parties end up settling before the hearing phase of the litigation.[90] In 2007, ALJs were responsible for a total of 2,863 cases. Out of the 2,058 total dispositions in 2007, only 60 cases were disposed of with a hearing, while 1,998 were disposed of without a hearing.[91]

Cases heard by ALJs may proceed in one of two ways: conventional proceedings or simplified proceedings. Under either type of proceeding, a cited employer or an affected employee may appear with or without legal counsel, and OSHA's representative is the Secretary of Labor, who is represented by a government attorney and bears the burden of proving that the cited violation(s) occurred.

The Chief ALJ may designate a case for simplified proceedings soon after the notice of contest is received by OSHRC. A party may also request that simplified proceedings be instituted.[92] Simplified proceedings are typically used to resolve small and relatively simple cases in a less formal, less costly, and less time-consuming manner.[93] Like conventional proceedings, simplified proceedings consist of a trial before an ALJ with sworn testimony and witness cross-examination. The parties, along with the ALJ, are required to narrow down and define the disputes between the parties.[94] During these proceedings, motions are discouraged unless the parties first try to resolve the matter among themselves. Discovery is also discouraged and permitted only when ordered by the ALJ. In addition, formal rules of procedure and evidence, which govern conventional proceedings, do not apply.[95] Each party may present an oral argument at the close of the hearing; however, post-hearing briefs are not allowed unless ordered by the ALJ. In addition, in some instances under simplified proceedings, the ALJ will render his or her decision from the bench.[96] In 2007, 55% of new cases were assigned to simplified proceedings.[97]

Conventional proceedings are covered by four sets of rules, including the Federal Rules of Evidence.[98] A transcript of the hearing is made by a court reporter. The ALJ is authorized to call and examine witnesses,[99] who then may be cross-examined by the parties.[100] After the hearing is completed and before the ALJ reaches a decision, each party is given an opportunity to submit to the judge proposed findings of fact and conclusions of law with reasons outlining why the ALJ should decide in its favor. After hearing the evidence and considering the arguments, the ALJ prepares a decision based upon the evidence placed in the hearing record. The ALJ's decision must be in writing and must include findings of fact, conclusions of law, and reasoning. It must also include an order affirming, modifying, or vacating each contested item and directing any other appropriate relief.[101]

The parties (either the Secretary of Labor or the private party) may object to the ALJ's decision by filing a Petition for Discretionary Review ("PDR") with OSHRC. In addition, under section 12(j) of the OSH Act, any commissioner may direct a case for review even without a party filing a PDR.[102] Such cases are

---

90 ROTHSTEIN, *supra* note 80, at § 16:6.

91 OCCUPATIONAL SAFETY & HEALTH REVIEW COMM'N, *supra* note 86.

92 29 C.F.R. § 2200.203.

93 *Id.* § 2200.202; U.S. Occupational Safety and Health Review Commission, *supra* note 85.

94 29 C.F.R. § 2200.207.

95 *Id.* § 2200.209.

96 *Id.* § 2200.200. However, when an ALJ issues a decision from the bench, within 45 days after the hearing ends, the ALJ will place a written version of the oral decision in the record. If the ALJ does not make a ruling from the bench, the ALJ will prepare a written decision that is generally sent to the parties within 45 days of the close of the hearing. U.S. Occupational Safety and Health Review Commission: Guide to Simplified Proceedings (Aug. 2005), http://www.oshrc.gov/publications/proceedings.html.

97 U.S. Occupational Safety and Health Review Commission, *supra* note 85.

98 OSHRC has adopted its own rules of procedure pursuant to Section 12(g) of the OSH Act. Section 12(g) provides that unless a specific OSHRC rule applies, proceedings are to be held in accordance with the Federal Rules of Civil Procedure. In addition, the Administrative Procedure Act has been applied to OSHRC proceedings. *See* U.S. Occupational Safety and Health Review Commission, Employee Guide to Review Commission Procedures: Supplement to the Guide to Review Commission Procedures § 2 (Aug. 2005), http://www.oshrc.gov/publications/employeeguide/employeeguide_supp.html (describing use of Federal Rules of Evidence); ROTHSTEIN, *supra* note 80, at § 16:3.

99 29 C.F.R. § 2200.67.

100 ROTHSTEIN, *supra* note 80, at § 17:14.

101 29 C.F.R. § 2200.90.

102 29 U.S.C. § 661(j).

typically limited to novel questions of law or policy or questions involving conflicts of ALJ decisions.[103] If OSHRC chooses not to review the ALJ's decision, the decision becomes a final order of OSHRC 30 days after it has been filed.[104] However, OSHRC has held that un-reviewed ALJ decisions do not have any precedential value and that, if only part of the ALJ's decision is directed for review, then only the reviewed portion has precedential value.[105]

If OSHRC does review an ALJ's decision, its decision becomes the final order. Unless OSHRC orders otherwise, a direction for review establishes jurisdiction in OSHRC to review the entire case. The issues to be decided on review are within the discretion of OSHRC but ordinarily will be those stated in the direction for review, those raised in the PDR, or those stated in any other order. OSHRC will ordinarily not review issues that the ALJ did not have the opportunity to decide upon.

Each commissioner has the assistance of an attorney who is responsible for providing assistance and advice on all pending matters, including the proper disposition of cases and motions, and whether cases are appropriate for OSHRC review.[106] The Commission had 27 pending cases at the beginning of 2007. During 2007, it received 25 new cases for review and issued 27 decisions by the end of that year.[107]

If an ALJ decision is not reviewed by OSHRC, the petitioning party may request review by the court of appeals for the circuit in which the violation is alleged to have occurred or in the District of Columbia Circuit.[108] In addition, a party facing an adverse decision from OSHRC may appeal the decision to the U.S. Court of Appeals within 60 days after OSHRC's final decision is issued.[109]

In judicial review of contested OSHA cases, courts have typically shown deference to the interpretation given to the statute by OSHRC. However, the U.S. Supreme Court has held that OSHA (as the rulemaking agency) deserves more deference in interpreting its statutes than OSHRC when OSHA and OSHRC disagree.[110] The courts of appeals have applied the same standard of review to an un-reviewed ALJ's decision as to an OSHRC decision. They have used the "substantial evidence" rule for factual findings, while legal conclusions may be set aside when they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.[111]

Commentators have argued that more members of OSHRC are needed in order to resolve its backlog of cases. This backlog has occurred because of instances where OSHRC has been unable to act, due to vacancies in its membership, two members not being present to provide the necessary quorum, or a deadlock occurring among the commissioners.[112]

B. National Labor Relations Board

The National Labor Relations Board ("NLRB") is an independent agency created by statute to administer the National Labor Relations Act. The NLRB was created at the same time as the Act — thus, there was no predecessor, and the NLRB has always existed in its current form.[113] The NLRB has both an administrative and an adjudicatory function. It oversees elections regarding union representation and tries to deter, as well as remedy, unfair labor practices by both

103 29 C.F.R. § 2200.92(b).

104 29 U.S.C. § 661(j).

105 Rothstein, *supra* note 80, at § 18:5.

106 Occupational Safety & Health Review Comm'n, *supra* note 86.

107 *Id*.

108 Rothstein, *supra* note 80, at § 1:4.

109 29 U.S.C. § 660(a); Rothstein, *supra* note 80, at § 1:4.

110 *See* Martin v. OSHRC, 499 U.S. 144, 152 (1991).

111 Walter B. Connolly, Jr. & Donald R. Crowell, II, A Practical Guide to the Occupational Safety and Health Act § 10.13 (2008).

112 AllGov, Occupational Safety and Health Review Commission, http://www.allgov.com/Agency/Occupational_Safety__Health_Review_Commission__OSHRC_ (last visited Dec. 24, 2009); Occupational Safety & Health Review Comm'n, *supra* note 86.

113 Nat'l Labor Relations Bd., The NLRB: What It Is, What It Does [hereinafter NLRB, What It Is], *available at* http://www.nlrb.gov/nlrb/shared_files/brochures/whatitis.pdf.

employers and unions.[114] Here, we examine only the adjudicatory function.

The NLRB has power "to prevent any person from engaging in any unfair labor practice affecting commerce."[115] By statute, it has broad powers to make any rules and regulations necessary to carry out its duties.[116] The NLRB sits in Washington, D.C., but "may meet and exercise any or all of its powers at any other place."[117]

The Board consists of five members appointed by the President with the advice and consent of the Senate for five-year overlapping terms.[118] The President also designates one member to serve as Chair.[119] Members are eligible for reappointment.[120] Members may only be removed "by the President, upon notice and hearing, for neglect of duty or malfeasance in office."[121] They have broad statutory power to delegate their duties, which include investigatory powers, to ALJs and regional offices.[122]

The NLRB also has a General Counsel, typically referred to as the prosecutor, who is separately appointed by the President for a four-year term and is responsible for the investigation and prosecution of unfair labor practice cases.[123] Thus, the "adversary" in NLRB cases is, in fact, within the NLRB itself. The General Counsel is, however, technically independent from the Board.[124]

The process of an NLRB case begins when a charge is filed against an employer or union in a regional office, which operates under the Office of the General Counsel.[125] The regional office conducts an investigation to determine whether there is reasonable cause to believe the NLRA has been violated.[126] The Regional Director then determines whether the charge has merits.[127] If the charge does not have merits, it is dismissed.[128] If it does have merits, the Regional Director will first seek voluntary settlement, and then, if no settlement is reached, issue a formal complaint.[129]

The case then proceeds to hearing before an ALJ. The person against whom the complaint is filed may appear at the hearing and file an answer to the complaint.[130] The ALJ and the parties may call witnesses, cross-examine witnesses, and introduce evidence.[131] The hearing proceeds using the Federal Rules of Evidence as much as practicable.[132] At the conclusion of the case, the ALJ will issue a decision "stating findings of fact and conclusions as well as the reasons for determinations on all material issues, and making recommendations as to the action which should be taken on the case."[133]

---

114 *Id*.

115 29 U.S.C. § 160(a). However, the NLRB's jurisdiction is limited to businesses that have a substantial effect on commerce. NAT'L LABOR RELATIONS BD., BASIC GUIDE TO THE NATIONAL LABOR RELATIONS ACT (1997) [hereinafter BASIC GUIDE TO THE NLRA], *available at* http://www.nlrb.gov/nlrb/shared_files/brochures/basicguide.pdf.

116 29 U.S.C. § 156.

117 *Id*. § 155.

118 *Id*. § 153(a). One member's term expires each year. NLRB, WHAT IT IS, *supra* note 113.

119 29 U.S.C. § 153 (a).

120 *Id.* § 154(a).

121 *Id*. § 153(a).

122 *Id*. § 153(b); BASIC GUIDE TO THE NLRA, *supra* note 115.

123 29 U.S.C. § 153(d).

124 NLRB, WHAT IT IS, *supra* note 113.

125 29 C.F.R. § 101.2.

126 *Id*. § 101.4.

127 *Id*. § 101.6.

128 *Id.* This can be appealed to the General Counsel, but there is no appeal after that.

129 *Id.* §§ 101.7-8.

130 29 U.S.C. § 160(b).

131 29 C.F.R. § 101.10(a).

132 29 U.S.C. § 160(b).

133 29 C.F.R. § 101.11(a).

The decision of the ALJ is then automatically filed with the NLRB itself.[134] To appeal the ALJ's decision, a party must file objections with the NLRB.[135] The other party may then file a responsive brief or cross exceptions.[136] If no exceptions are filed, the ALJ's decision becomes final. If exceptions are filed, the NLRB will review the entire record with staff counsel, who function much like law clerks.[137] Oral argument may be requested, but is not automatically granted.[138] The NLRB then issues a decision which may adopt, modify, or reject the findings and recommendations of the ALJ.[139] The NLRB's order must contain detailed findings of fact, conclusions of law, and basic reasons for decision on all material issues raised.[140]

Very few cases, however, make it to this level. In 2007, the most recent year for which statistics are available, 22,331 unfair labor practice petitions were filed with Regional Offices.[141] Of these, only 1,779 resulted in the filing of a complaint,[142] and only 470 led to hearings before an ALJ, with 433 ALJ decisions being entered.[143] Nearly three-fourths (316) of these decisions were contested before the NLRB itself.[144] These numbers have been more or less consistent from year to year since 2003.[145]

Decisions of the NLRB may come before the federal courts of appeals in one of two ways. First, the Board can petition to an appellate court to enforce the order in the circuit where the unfair labor practice occurred.[146] Second, a person aggrieved by a final order of the Board can seek review in the circuit where the unfair labor practice allegedly occurred, in the circuit where such person lives or transacts business, or in the District of Columbia Circuit.[147] In either case, the court can affirm, reverse, or modify the order.[148]

The appeals courts review these decisions using a substantial evidence standard.[149] The Board is generally afforded considerable deference.[150] In 2007, 68 cases ended up in the federal courts.[151] The courts affirmed the NLRB 86.8% of the time.[152]

Despite the relatively small number of cases reversed by federal courts, the NLRB has been faced with significant criticism for political bias. The NLRA has been called "a statute in flux with rulings turning on the ideological approach of its interpreters."[153]

---

134 *Id.* § 101.11(b).

135 *Id.*

136 *Id.*

137 *Id.* § 101.12(a).

138 *Id.* § 101.11(b).

139 *Id.* § 101.12(a).

140 *Id.*

141 Nat'l Labor Relations Bd., Seventy Second Annual Report of the National Labor Relations Board for the Fiscal Year Ended September 30 2007 [hereinafter 2007 NLRB Annual Report], *available at* http://www.nlrb.gov/nlrb/shared_files/brochures/Annual%20Reports/Entire2007Annual.pdf.

142 *Id.*

143 *Id.*

144 *Id.*

145 *See* National Labor Relations Board, Annual Reports, http://www.nlrb.gov/publications/reports/annual_reports.aspx (last visited Dec. 24, 2009). 2003 is the earliest annual report available on the NLRB website.

146 29 U.S.C. § 160(e). Notably, this is the extent of the Board's enforcement power. The Board lacks contempt power, although it can petition the federal court to find a party in contempt for refusing to obey an order.

147 *Id.* § 160(f).

148 *Id.*

149 *Id.* § 160(g). The decision will be upheld as conclusive if "supported by substantial evidence on the record considered as a whole."

150 *See* NLRB v. Curtis Matheson Scientific, 494 U.S. 775, 787 (1990).

151 2007 NLRB Annual Report, *supra* note 141.

152 *Id.* These figures are similar to those for the prior years — in 2002-2006, out of 440 total appeals, 318 (72.2%) were affirmed; 28 (6.4%) were remanded; 28 (6.4%) were modified; 49 (11.1%) were set aside; and 17 were affirmed in part and remanded in part (3.9%).

153 Peter M. Panken, *Union Organizing and NLRB Representation Cases: A Management Perspective*, *in* Employment and Labor Relations Law for the Corporate Counsel and General Practitioner Coursebook 443 (2008).

There are often "abrupt changes in precedent following a change in presidential administration . . . [which] undermines the stability, certainty, and efficiency of its policies."[154] The Board has been described as "polarized" between labor and management forces, which has "eroded the agency's role as a neutral and principled adjudicator."[155] The D.C. Circuit has stated that the Board is "rogue," "contumacious," and "the antithesis of reasoned decision-making."[156]

While the short terms that Board members serve may be partially to blame for this critique,[157] NLRB ALJs have also been criticized for bias, perhaps because many of them come from positions within the NLRB and tend to "harbor the same predilections" they had as employees.[158] Thus, despite the fact that the Board is somewhat independent, and, in a sense, is in control of its own rules and regulations rather than answering to a "higher power," it does not appear to be free from political influence. This affects perceptions of the fairness of its adjudication. In addition, some have asserted that because precedent is constantly changing with shifts in political power in Washington, the NLRB's decisions do not provide consistent legal precedent for unions and management.[159]

C. Merit Systems Protection Board

The Merit Systems Protection Board ("MSPB") was established by the Civil Service Reform Act of 1978 to adjudicate personnel claims involving civil service members.[160] The 1978 statute separated the functions of the former Civil Service Commission into three separate entities — the Office of Personnel Management ("OPM"), the Federal Labor Relations Authority, and the MSPB, which assumed adjudicatory functions over most federal employee personnel disputes.[161] The decision to divide the agency in such a manner was not made lightly. President Carter established nine task forces to study "all aspects of the civil service" prior to the drafting of the legislation.[162] This effort concluded that the credibility of the Civil Service Commission as an impartial adjudicator of personnel decisions was undermined by the fact that personnel policy decisions came from the same office.[163] The legislative history of the Civil Service Reform Act echoes this concern, indicating that this severing of functions evidenced a belief that "the combination of the managerial and employee-protection functions in one agency — the Commission — was unsound, and those functions, to be exercised efficiently, must be divided."[164] OPM was meant to represent the interests of the government in such disputes, while the MSPB was meant to be a neutral adjudicator, allowing both agencies to perform their functions "to the fullest effect."[165]

The Board, its composition, and its jurisdiction are specifically defined by statute.[166] The Board has its principal office in Washington, D.C. and field offices in other locations.[167] The MSPB consists of three members[168] appointed by the President, no more than two of whom can be from the same political party.[169]

---

154 Clair Tuck, *Policy Formulation at the NLRB: A Viable Alternative to Notice and Comment Rulemaking*, 27 Cardozo L. Rev. 1117, 1118 (2005).

155 James J. Brudney, *Isolated and Politicized: The NLRB's Uncertain Future*, 26 Comp. Lab. L. & Pol'y J. 221, 243 (2005).

156 Matthew Ginsburg, *"A Nigh Endless Game of Battledore and Shuttlecock": The D.C. Circuit's Misuse of Chenery Remands in NLRB Cases*, 86 Neb. L. Rev. 595, 597 (2008).

157 Panken, *supra* note 153, at 448.

158 *Id.* at 449.

159 Tuck, *supra* note 154, at 1118.

160 Civil Service Reform Act, Pub. L. 95-454, § 7104, 92 Stat. 1111 (1978).

161 *See* Earl Sanders, *5 U.S.C. § 7703(d): The Civil Service Commission Did Not Fade Away — Entirely*, 31 How. L.J. 197, 197 (1988).

162 Major John P. Stimson, *Unscrambling Federal Merit Protection*, 150 Mil. L. Rev. 165, 167 (1995).

163 *Id.*

164 Sanders, *supra* note 161, at 198.

165 *See id.* at 199; S. Rep. No. 95-969, (1978).

166 5 U.S.C. § 1201, *et seq.*

167 *Id.* § 1201.

168 *Id*.

169 *Id*.

Members must have "demonstrated ability, background, training, or experience [that makes them] especially qualified to carry out the functions of the Board."[170] They are confirmed by the Senate and serve overlapping seven-year, non-renewable terms, which may be extended for up to one year until a replacement is appointed.[171] Members may be removed by the President for "inefficiency, neglect of duty, or malfeasance in office."[172]

The President appoints one member as the Chairman, with the advice and consent of the Senate.[173] The President may designate another member as the Vice Chairman to fill in for the Chairman when absent or disabled, as well as when the Chairman position is vacant.[174] As of March 2009, there were only two members on the Board, Neil Anthony Gordon McPhie and Mary M. Rose, who were appointed by George W. Bush and have backgrounds in employment related issues.[175]

The Board has the power to hear, adjudicate or provide for the hearing or adjudication of all matters within its jurisdiction, and to order any federal agency or employee to comply with any order or decision issued by the Board and enforce compliance with any such order.[176] In addition to its adjudicatory power, the Board may conduct special studies related to the civil service and other merit systems in the executive branch and report to the President and Congress.[177] The Board also has the power to review the rules and regulations of the Office of Personnel Management.[178] The Board is responsible for submitting a proposed budget to Congress, and may submit recommendations to the President and Congress as well.[179] In addition, the Board is required to submit an annual report to Congress.[180] The Board can delegate any of its administrative functions to any employee of the Board.[181]

The MSPB process typically begins when a federal employee files an appeal of an adverse agency decision, such as termination from employment. The case is handled by an ALJ or an administrative judge; however, the number of administrative judges far exceeds the number of ALJs.[182] Appeals filed by MSPB employees or ALJs and proceedings initiated by the Special Counsel[183] such as Hatch Act cases are referred to an ALJ.[184] In addition, the MSPB has traditionally assigned other "sensitive" cases to an ALJ.[185]

All other cases proceed before an administrative judge, who does not have the status or protections of an ALJ. Unlike the ALJs, the administrative judges are subjected to informal quality control mechanisms, have their decisions reviewed by a regional director before they are issued and have their performance reviewed as well. MSPB sets quantitative standards for minimally

170 *Id.*

171 *Id.* §§ 1201-1202.

172 *Id.* § 1202(d).

173 *Id.* § 1203(a).

174 *Id.* § 1203.

175 *See* U.S. Merits Systems Protection Board, About MSPB, http://www.mspb.gov/sites/mspb/pages/About%20MSPB.aspx (last visited Dec. 24, 2009).

176 5 U.S.C. § 1204(a).

177 *Id.* § 1204(a)(3).

178 *Id.* § 1201(a)(4).

179 *Id.* § 1204.

180 *Id.* § 1206.

181 *Id.* § 1204(g).

182 John H. Frye III, *Survey of Non-ALJ Hearing Programs in the Federal Government*, 44 ADMIN. L. REV. 261, 328 (1992).

183 The Special Counsel is appointed by the President with the consent of the Senate. In general, the Special Counsel brings proceedings to correct prohibited personnel practices by agencies and to discipline employees. *Id.* at 328.

184 *Id.*; 5 C.F.R. §§ 1201.13, 1201.124(a)(3), 1201.135(a).

185 Press Release, U.S. Merits Sys. Prot. Bd., MSPB to Use NLRB Administrative Law Judges (Mar. 9, 2001), *available at* http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=236476&version=236735&application=ACROBAT.

satisfactory performance, fully satisfactory performance, and performance that exceeds the standard, while the ALJs are not subject to these quantitative standards.[186]

The MSPB ALJs and administrative judges follow the same procedures at their hearings.[187] They hold a trial-type hearing, at which the employee, the agency and the judge may present witnesses and evidence, cross-examine witnesses, take depositions, and receive evidence.[188] The federal employee may retain counsel or represent himself or herself.[189] The presiding judge will then issue a written decision that "must identify all material issues of fact and law, summarize the evidence, resolve issues of credibility, and include the Administrative Judge's conclusions of law and legal reasoning, as well as the authorities on which that reasoning rests."[190] On average, it takes three months to receive a decision from an administrative judge or ALJ.[191]

The employee may file an appeal with the MSPB within 35 days of the initial decision or may file an appeal directly with the United States Court of Appeals for the Federal Circuit.[192] In the former case, if the MSPB declines to accept review, the employee may then appeal to the Federal Circuit. Generally, the MSPB only accepts review "when significant new evidence is presented that was not available for consideration earlier or when the administrative judge made an error in interpreting a law or regulation."[193]

Appeals are considered by all three Board members,[194] with the assistance of the Office of Appeals Council, which conducts legal research and prepares proposed decisions for the Board.[195] All decisions by the Board are published and precedential.[196] The MSPB usually affirms the ALJ or administrative judge's decision.[197] The employing agency's decision will be reversed or remanded if the employee can show harmful error in the application of the agency's procedures in arriving at a decision, show that the decision is based on any prohibited personnel practice, or show that the decision was not in accordance with the law.[198]

The MSPB's final decision may be appealed to the Federal Circuit within 60 days after the employee receives notice of the decision.[199] The Federal Circuit generally upholds the Board's decisions, reversing only 7% of MSPB decisions in 2008, 8% in 2007, 8% in 2006, 6% in 2005, and 5% in 2004.[200]

The MSPB has generally not faced criticism for being politicized, such as that faced by the NLRB. On the contrary, the MSPB has been noted to be a particularly well-functioning body that issues quality

186 Frye, *supra* note 182, at 329.

187 *Id*. Like the NLRB, the MSPB prioritizes and emphasizes settlement; thus, many cases do not even reach the hearing stage. Jessica L. Parks, *The Merit Systems Protection Board as a Model Forum*, 4 Fed. Cir. B.J. 15, 19 (2004).

188 5 U.S.C. § 1204(b). Modified procedures will be followed in some cases, such as those involving confidential or policy making employees. 5 C.F.R. § 1215.

189 U.S. Merits Systems Protection Board, Processing Appeals, http://www.mspb.gov/sites/mspb/pages/The%20Appeal%20Process.aspx (last visited Dec. 24, 2009).

190 *Id.* (quoting Spithaler v. Office of Pers. Mgmt., 1 M.S.P.R. 587, 589 (1980)).

191 U.S. Merits Sys. Prot. Bd., Performance and Accountability Report for FY 2008, at 15 (2008). This is an average rate over the period 2005-2008.

192 *Id.*

193 5 C.F.R. § 1201.115.

194 U.S. Merits Systems Protection Board, *supra* note 189.

195 U.S. Merits Sys. Prot. Bd., *supra* note 191, at 3.

196 Parks, *supra* note 187, at 18.

197 Paul Secunda, *Whither the Pickering Rights of Federal Employees?*, 79 U. Colo. L. Rev. 1101, 1129-30 (2008).

198 5 C.F.R. § 7701(c)(2).

199 5 U.S.C. § 1214(c). However, if discrimination allegations or the Hatch Act are involved, the case goes to the United States District Courts. U.S. Merit Systems Protection Board, Judicial Review, http://www.mspb.gov/sites/mspb/pages/About%20MSPB.aspx (last visited Dec. 24, 2009).

200 U.S. Courts, Table B-8; US Court of Appeals for the Federal Circuit — Appeals Filed, Terminated, and pending during the 12-Month Period, *available at* http://www.cafc.uscourts.gov/statistics.html (fiscal years 2004-2008).

decisions and processes cases efficiently.[201] This perhaps stems from the legislative scheme that created the MSPB as a neutral adjudicator, as discussed above. The perceived lack of bias in the MSPB may also be at least partially attributed to the fact that the disputes it handles are somewhat less politically charged than those before the NLRB or those that would come before an immigration agency.

D. The Social Security Administration

The Social Security Administration ("SSA") adjudicates claims for social security disability benefits. SSA processes approximately 2.5 million applications for disability benefits each year, and its ALJs resolve approximately 550,000 contested cases. The SSA system, like the immigration system, is a multi-tiered adjudication system that provides claimants with multiple opportunities to present their cases. The underlying claims heard by the SSA, like immigration claims, are typically very fact-specific.[202]

The process of moving a case through the SSA system is similar to the process in the asylum system. Disability applications are first decided in a purportedly non-adversarial setting by state Disability Determination Service examiners. A disability claimant who receives an adverse decision from the state examiner must file a petition for reconsideration with the state agency before the claimant can have an in-person hearing before an ALJ.[203]

Disappointed individuals have a subsequent opportunity to have their disability claims heard by an ALJ de novo by requesting a hearing.[204] The judge who conducts the hearing has not had any role in the previous decisions. The claimant and his or her representative may attend the hearing to explain the case to the judge in person, may review the information in the claimant's file, and may provide any new information that may be helpful. This typically constitutes the claimant's first chance to appear at a hearing in person. The disability hearing is sometimes held by videoconference rather than in person. A videoconference hearing is often more convenient for the claimant and the claimant's witnesses and can typically be scheduled faster than an in-person hearing.

At the hearing, the ALJ may question the claimant and any witnesses that the claimant brings to the hearing. The claimant or his or her representative may also question these witnesses. The claimant is typically not required to attend the hearing; however, if the claimant chooses not to attend, he or she must notify the SSA in writing of this decision. Unless the ALJ believes that the claimant's presence is needed to decide the case, the ALJ will make the decision based on information in the claimant's file and any new information that has been added at the hearing.[205] When the ALJ has reached a decision, a written copy is sent to the claimant.[206] The ALJ reviews the claimant's record and provides a written explanation discussing why the claimant is "disabled" or "not disabled."

A disability claimant may request a review of an ALJ decision before an administrative appeals unit called the Appeals Council.[207] The Appeals Council consists of approximately 30 judges who review decisions of the ALJs.[208] The Appeals Council may decline such review.[209] If it accepts review, the Appeals Council considers all evidence in the ALJ record, as well as any new and material evidence submitted by the parties.[210] It may also request evidence from the parties

---

201 *See* Parks, *supra* note 187, at 17. Although this article was written while Ms. Parks was serving as a member of the MSPB, this particular statement was based on her experience as a litigator for the United States Government, where she appeared before the MSPB as well as many other federal administrative forums.

202 Margaret H. Taylor, *Refugee Roulette in an Administrative Law Context: The Déjà Vu of Decisional Disparities in Agency Adjudication*, 60 STAN. L. REV. 475, 486-87 (2007).

203 *Id.* at 488 n.54.

204 *Id.* at 488.

205 Ashley Gurdon, *How to Appeal a Social Security Disability Denial*, GOARTICLES.COM, Oct. 8, 2007, http://www.goarticles.com/cgi-bin/showa.cgi?C=640296.

206 20 C.F.R. §§ 404.953, 416.1453; Frank S. Bloch, Jeffrey S. Lubbers & Paul R. Verkuil, *Developing a Full and Fair Evidentiary Record in a Nonadversary Setting: Two Proposals for Improving Social Security Disability Adjudications*, 25 CARDOZO L. REV. 1, 26 (2003).

207 Taylor, *supra* note 202, at 488-89.

208 20 C.F.R. § 404.967; Social Security Online, Brief History and Current Information About the Appeals Council, http://www.ssa.gov/appeals/about_ac.html (last visited Dec. 24, 2009).

209 Jason D. Vendel, *General Bias and Administrative Law Judges: Is there a Remedy for Social Security Disability Claimants?*, 90 CORNELL L. REV. 769, 775 (2005). The government may not seek a similar review. Gurdon, *supra* note 205.

210 20 C.F.R. § 404.976(b)(1).

if it feels it is needed and it will not adversely affect the claimant's rights.[211] The Appeals Council issues its decision based on the record, and does not hold oral argument except upon request if the case raises an important question of law or policy or argument is otherwise needed to reach a proper decision.[212] An applicant may receive copies of what the Appeals Council relied upon by submitting a request and paying the cost of providing the copies.[213] Briefs may be filed upon request.[214] On average, it takes the Appeals Council 238 days, or more than seven months, to adjudicate a case from the date it is filed.[215]

The Appeals Council is a creature of regulation, and members lack the protection of the APA and are subject to performance evaluations.[216] The Appeals Council is assisted by the Office of Appeals Operations, a group of non-attorney analysts who review cases and make recommendations to Appeals Council members. In addition, the two-member review completed by the Appeals Council provides an additional check on consistency and correct application of law.[217] Also, Appeals Council members follow the requirements for ALJ decisions and must, in their decisions, explain the evidence relied upon, the central legal authority, and the considerations that led to the outcome.[218]

Decisions of the Appeals Council do not have precedential value.[219] They may be appealed by filing an action in a United States District Court within 60 days.[220] Federal district courts have reversed and remanded more than 50% of disability cases.[221] This suggests that district court judges and magistrates may be skeptical of the quality of the underlying SSA decision process.[222]

III. Hybrid System for Veterans' Appeals

The system for granting and assessing veterans' benefits is the only existing hybrid adjudication model we studied, consisting of an agency within the executive branch for trial-level proceedings, an Article I court for initial appellate review, and final review in an Article III court. It is, however, a system with a very different emphasis and philosophy, because Congress designed it to aid veterans and minimize its adversarial nature.

A. Structure: Bodies, Members and Procedures

The veterans' benefits system consists of several layers. First, the veteran files a claim for benefits with the Regional Office.[223] If the veteran is unhappy with the determination, the veteran may lodge an appeal with the Board of Veterans Appeals ("BVA"). The Regional Offices and the BVA both sit within the Department of Veterans Affairs ("VA"). Appeals from the BVA are heard by the Court of Appeals for Veterans Claims ("CAVC").[224] The veteran or the agency may appeal from an adverse determination by the CAVC to the Court of Appeals for the Federal Circuit ("CAFC" or "Federal Circuit"), albeit only on questions of law.[225]

---

211 *Id.* § 404.976(b)(2).

212 *Id.* § 404.976(c).

213 *Id.* § 404.974.

214 *Id.* § 404.975.

215 Social Security Online, General Appeals Council Statistics, http://www.ssa.gov/appeals/ac_statistics.html (last modified Sept. 28, 2009).

216 Charles H. Koch, David A. Koplow, *The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council*, 17 FLA. ST. U. L. REV. 199, 238 (1990).

217 *Id.* at 255.

218 *Id.* at 256.

219 *Id.* at 233.

220 20 C.F.R. § 404.981.

221 Paul R. Verkuil & Jeffrey S. Lubbers, *Alternative Approaches to Judicial Review of Social Security Disability Cases*, 55 ADMIN. L. REV. 731, 739 (2003).

222 *See id.*

223 *Id.* at 763. This section does not focus on the Regional Offices, partly because there is little statistical information on them, but also because the House recently conducted hearings into the Regional Offices' systematic failures in processing claims. *See Document Tampering and Mishandling at the Veterans Benefits Administration: Hearing Before the Subcomm. on Disability Assistance and Memorial Affairs of the H. Comm. on Veterans' Affairs*, 111th Cong. (2009), *available at* http://veterans.house.gov/hearings/hearing.aspx?NewsID=340.

224 Formerly the Court of Veterans' Appeals, the name was changed in 1999.

225 38 U.S.C. § 7292; Verkuil & Lubbers, *supra* note 221, at 763.

From there, a veteran may, theoretically, apply to the Supreme Court,[226] but the Court has only granted certiorari once, in 1994.[227]

1. The Board of Veterans Appeals

The BVA was created in 1933.[228] It currently consists of a Chairman, a Vice Chairman, a Principal Deputy Vice Chairman, and four Deputy Vice Chairmen who are in charge of four "Decision Teams." There is a Decision Team for each region: Northeast, Southeast, Midwest, and West (including the Philippines).[229] Each decision team consists of a Deputy Vice Chairman, two Chief Veteran Law Judges, 12 line judges, two senior counsels, and 71 staff counsels.[230] There are 60 Veteran Law Judges ("VLJs") in total.[231]

The President appoints the Chairman of the BVA on the advice and consent of the Senate.[232] The Chairman serves for six years and may serve for more than one term.[233] The Chairman is removable by the President alone, and only for "misconduct, inefficiency, neglect of duty, or engaging in the practice of law or for physical or mental disability which, in the opinion of the President, prevents the proper execution of the Chairman's duties."[234] The Secretary of VA appoints the other members from a list of recommendations from the Chairman; the President must "approve" the Secretary's choices.[235] The Secretary also chooses the Vice Chairman from the existing members. The Vice Chairman's role is to "perform such functions as the Chairman may specify." The Secretary also may choose to remove the Vice Chairman from that office.[236]

The qualifications to be a VLJ are that the candidate be a member of good standing of a bar of a state.[237] A VLJ is not per se an ALJ and is not appointed through the Office of Personnel Management. A serving VLJ, however, is paid according to the same salary scale as an ALJ.[238] Unlike ALJs, VLJs are subject to performance review.[239] Those VLJs not meeting the standards set for job performance may be removed by the Secretary on the Chairman's recommendation.[240] Otherwise, the Secretary may only remove a VLJ for a matter unrelated to job performance under the same circumstances as prescribed for ALJs, including a hearing before the Merit Systems Protection Board.[241]

The statutory scheme does not provide for a fixed number of VLJs. Congress specifically provided for "such number of members as may be found necessary in order to conduct hearings and dispose of appeals properly before the BVA in a timely manner."[242] The statute also provides that there must be sufficient support staff — professional, administrative, clerical, and stenographic personnel — as are necessary to allow the BVA to "conduct hearings and consider and dispose of appeals properly before the BVA in a timely manner."[243]

There is thus a Congressional mandate to provide timely, efficient hearings for veterans' claims. To help this process, the BVA is mandated by law to provide data on cases filed and pending in each fiscal year.[244]

---

226 28 U.S.C. § 1254.

227 Brown v. Gardner, 513 U.S. 115 (1994) (unanimous Court holding that veteran's benefits do not require that an injury result from negligent treatment by the VA or an accident occurring during treatment).

228 Bd. of Veterans' Appeals, Annual Report to Congress 2008, at 3 (2008) [hereinafter BVA Annual Report].

229 *Id.*

230 *Id.*

231 *Id.*

232 38 U.S.C. § 7101(b)(1).

233 *Id.* § 7101(b)(1), (3).

234 *Id.* § 7101(b)(2).

235 *Id.* § 7101A(a)(1).

236 *Id.* § 7101(b)(4).

237 *Id.* § 7101A(a)(2).

238 *Id.* § 7101A(b).

239 The Board Chairman is required by law to set up a panel of VLJs to review the VLJs' performance. *Id.* § 7101(c)(1)(A).

240 *Id.* § 7101A(c)-(d).

241 *Id.* § 7101A(e)(2) (referring to 5 U.S.C. § 7521).

242 *Id.* § 7101(a).

243 *Id.* § 7101(a).

244 *Id.* § 7101(d)(2)

The cases before the BVA are open. This means that the claimant may add information or evidence at any time prior to a final decision.[245] This is intended to be as pro-claimant as possible.[246] The case file becomes "closed" when the BVA issues its final decision and remains closed when it comes before the CAVC.

If the BVA decides adversely against the veteran, the veteran may appeal, either by filing for reconsideration or filing a Notice of Appeal with the CAVC. The agency may not, however, appeal a decision to grant benefits.[247] This is "logical," because "the BVA is part of the Department of Veterans' Affairs and makes decisions in the shoes of the Secretary of Veterans Affairs."[248]

2. The United States Court of Appeal for Veterans Claims

Congress established the CAVC as an Article I court.[249] It was established in 1988 as the U.S. Court of Veterans Appeals,[250] but the Veterans' Programs Enhancement Act of 1998 changed its name to the U.S. Court of Appeals for Veterans Claims.[251] It sits in Washington, D.C., but may hear cases in any part of the country that the Chief Judge prescribes.[252] Although oral argument is extremely rare, granted in fewer than 1% of cases,[253] the court will hear argument in places outside of Washington, D.C.[254] The court is not part of the Department of Veterans Affairs.[255]

The CAVC's review is based on the record created before the BVA and the Regional Office. It has exclusive jurisdiction over cases decided by the BVA.[256] The CAVC has the power to reverse, modify, or affirm, as appropriate, on all relevant questions of law, constitution, statutory and regulatory provisions.[257] There is no de novo review of findings of fact.[258] Rather, the CAVC may overturn the BVA's finding of fact if it is "clearly erroneous," with application of the law to be reversed only if arbitrary, capricious or an abuse of discretion.[259] Each case is heard by a single judge, but the claimant may request a rehearing, either by a panel of three judges, or en banc.[260] Only those cases heard en banc or by a panel have precedential value.[261]

The CAVC has a minimum of three and a maximum of seven judges, including the Chief Judge.[262] The President appoints the judges on the advice and consent of the Senate, although the Senate's input is limited to the "grounds of fitness to perform the duties of the office."[263] The judges must be of good standing in a bar of the highest court of a State.[264] There are proscriptions on the political affiliations of the judges,

---

245 Verkuil & Lubbers, *supra* note 221, at 765.

246 *Id*.

247 38 U.S.C. § 7252(a); Gary E. O'Connor, *Rendering to Caesar: A Response to Professor O'Reilly*, 53 Admin. L. Rev. 343, 351 (2001).

248 Verkuil & Lubbers, *supra* note 221, at 766.

249 38 U.S.C. § 7251.

250 Veterans' Judicial Review Act, Pub.L. No. 100-687, 102 Stat. 4105 (1988).

251 Pub. L. No. 105-368, 112 Stat. 3315 (1998).

252 38 U.S.C. §§ 7255, 7256.

253 U.S. Court of Appeals for Veterans' Claims, Annual Reports 1999-2008 (2008) [hereinafter CAVC Annual Reports 1999-2008], *available at* http://www.uscourts.cavc.gov/documents/Annual_Report_-_20081.pdf.

254 U.S. Court of Appeals for Veterans' Claims, Guide for Counsel § II(A) (2009), *available at* http://www.uscourts.cavc.gov/documents/Guide_for_Counsel3.pdf ("Occasionally, the court holds oral arguments on law school campuses and other locations throughout the nation.").

255 *See* CAVC, About the Court, http://www.uscourts.cavc.gov/about/ (last visited Dec. 24, 2009).

256 38 U.S.C. § 7252(a).

257 *Id.* §§ 7252(a), 7261(a)(1).

258 *Id*. § 7261(c).

259 *Id*. § 7261(3)-(4).

260 Vet. App. R. 35(c).

261 Verkuil & Lubbers, *supra* note 221, at 766.

262 38 U.S.C. § 7253(a).

263 *Id*. § 7253(b).

264 *Id*.

such that if there are seven judges, no more than four may be members of the same political party.[265]

The judges serve for 15 years and may serve more than one consecutive term.[266] They may be removed by the President only for "misconduct, neglect of duty, or engaging in the practice of law."[267] To remove them, the President must provide the reasons for removal and a hearing.[268] The Chief Judge, appointed by the President, must have served at least one year on the CAVC to be eligible for the position and is limited to one term.[269] The CAVC judges are paid at the same rate as Article III district court judges.[270]

Either the agency or the veteran may appeal the CAVC's decision to the Federal Circuit. Appeal may only be brought on questions of law. This limits severely the number of claims before the Federal Circuit, and many are dismissed on jurisdictional grounds.[271] Scholars have noted that because the jurisdiction is so limited, the efficacy of the Federal Circuit is rarely discussed by interest groups of the VA Claims Processing Task Force.[272] The CAVC is not obviously, "embolden[ed]," as critics think it should be, to reverse the BVA's errors.[273] The CAVC is reversed in only around 10% of appeals decided on the merits.[274]

B. Caseload

The veterans' benefit system is extremely large. Over three million veterans and their survivors receive disability compensation or pension benefits.[275] With the high numbers of active soldiers and injuries stemming from the wars in Iraq and Afghanistan, those numbers are likely to remain high.

The BVA generally receives about 40,000 new cases each fiscal year.[276] In FY 2008, it issued an average of 167 decisions per workday — that is, nearly three decisions per VLJ per working day.[277] For the years 1998-2004, the CAVC experienced a generally consistent number of filings, between 2,150 and 2,532 per year.[278] However, since U.S. troops were deployed in Afghanistan and Iraq, the numbers have nearly doubled. In the fiscal years 2007 and 2008 there were a combined 8,772 new claims filed with the CAVC.[279] The CAVC in that time issued final decisions in 6,753 cases.[280] Of those, 472 were appealed to the Federal Circuit, which is just under 7% of all merits-based decisions.[281]

Other than FY 2002, for the past ten years fewer than 400 appeals have been lodged annually with the Federal Circuit from the CAVC. This is in part because the Federal Circuit may not hear any factual disputes.[282]

---

265 *Id.* ("Not more than the number equal to the next whole number greater than one-half of the number of judges of the Court may be members of the same political party.").

266 *Id.* § 7253(c).

267 *Id.* § 7253(f)(1).

268 *Id.* § 7253(f)(2).

269 *Id.* § 7253(d)(1). The Chief Judge may only serve up to five years or until the Judge reaches age 70, whichever comes first. *Id.* § 7253(d)(3).

270 *Id.* § 7253(e).

271 Verkuil & Lubbers, *supra* note 221, at 768.

272 *Id.*

273 James T. O'Reilly, *Burying Caesar: Replacement of the Veterans Appeals Process Is Needed To Provide Fairness to Claimants*, 53 ADMIN. L. REV. 223, 234 (2001).

274 U.S. Courts, Table B-8: U.S. Court of Appeals for the Federal Circuit — Appeals Filed, Terminated, and Pending, During the Twelve-Month Period Ended September 30, 2008 [hereinafter CAFC, Table B-8], *available at* http://www.cafc.uscourts.gov/pdf/b08sep08.pdf.

275 *See* Fact Sheet, U.S. Dept. of Veterans' Affairs, Facts About the Department of Veterans Affairs (Jan. 2009), *available at* http://www1.va.gov/OPA/fact/docs/vafacts.pdf.

276 BVA ANNUAL REPORT, *supra* note 228, at 17.

277 *Id.* at 20.

278 U.S. COURT OF APPEALS FOR VETERANS' CLAIMS, ANNUAL REPORTS 1998-2007 (2007) [hereinafter CAVC ANNUAL REPORTS 1998-2007], *available at* http://www.uscourts.cavc.gov/documents/Annual_Reports_2007.pdf.

279 CAVC ANNUAL REPORTS 1999-2008, *supra* note 253.

280 *Id.*

281 *Id.*

282 *See* 38 U.S.C. § 7292(a).

The CAVC was in 2008 only the fourth largest source for appeals to the Federal Circuit, behind the MSPB, Court of Federal Claims, and the district courts.[283] Appeals from the CAVC made up 12% of the Federal Circuit's docket.[284]

C. Results

In FY 2008, the BVA allowed benefits in 22% of all cases before it. It remanded for further investigation by the relevant Regional Office in 37% of claims, and denied benefits in 39% of all cases.[285] The remaining 2% are categorized by the BVA as "Other."[286]

In its merits decisions, the CAVC affirmed nearly 20% of all BVA decisions in FY 2008.[287] The court affirmed/reversed in part 17% and reversed/vacated and remanded roughly the same proportion. Nearly 46% of the cases were remanded completely to the BVA.[288] Oral argument was granted in only 17 cases out of the more than 3,500 decided in 2008.[289] The CAVC additionally dismissed 707 cases for procedural defects, with nearly half of those dismissed for lack of jurisdiction.[290]

In FY 2008, the Federal Circuit reversed the CAVC in 11% of all claims appealed.[291] This reversal rate is lower than the average rate of 13% for all cases in the Federal Circuit in FY 2008.[292] The district courts and the International Trade Commission and U.S. Court of International Trade both had a far higher reversal rate, of at least 20% each.[293]

D. Representation

Veterans may not have an attorney representative in the early stages of their claims. The attorney may become involved in the claim only when it is before the BVA.[294] According to one critic, this is a "deadly trap" for veterans, because most do not understand how to exhaust their remedies before appealing.[295]

Representation is limited by the fee that the attorney can collect, making it unattractive for private lawyers to become involved.[296] Counsel may not earn more than 20% of the past-due benefits awarded, and that award may be reviewed for being excessive.[297] Veterans have access to Veterans Services Organizations ("VSOs"), who help the veterans with the bulk of their fact-finding, and represent them in any interviews or hearings before the Regional Office, all the way up to the CAVC.[298]

When a claimant's Notice of Appeal is filed, the CAVC sends out a list of practitioners to all pro se appellants.[299] There is a search function on the CAVC website that allows the visitor to search for all practitioners in a given state.[300] Further, if there is to be a three-judge panel and the applicant needs an

283 U.S. Court of Appeals for the Federal Circuit, Appeals Filed in Major Origins, http://www.cafc.uscourts.gov/pdf/10yrHistCaseldByOrigin99-08.pdf (last visited Dec. 24, 2009).

284 U.S. Court of Appeals for the Federal Circuit, Appeals Filed, By Category: FY 2008, http://www.cafc.uscourts.gov/pdf/ChartFilings08.pdf (last visited Dec. 24, 2009).

285 BVA Annual Report, *supra* note 228, at 23.

286 *Id*.

287 CAVC Annual Reports 1999-2008, *supra* note 253.

288 *Id*.

289 *Id*.

290 *Id*.

291 CAFC, Table B-8, *supra* note 274.

292 *Id*.

293 *Id*.

294 Verkuil & Lubbers, *supra* note 221, at 765.

295 O'Reilly, *supra* note 273, at 235.

296 Verkuil & Lubbers, *supra* note 221, at 768.

297 *Id*. O'Connor points out that, according to the Veterans Appeals Manual, the CAVC usually rejects the VA's argument that the fees were excessive or redundant, and often grants the attorney extra fees for time spent defending the fee application. O'Connor, *supra* note 247, at 357-58.

298 Verkuil & Lubbers, *supra* note 221, at 769.

299 O'Connor, *supra* note 247, at 356. In 2001, when O'Connor's article was written, there were 350 attorneys in 45 states, Puerto Rico and Washington, D.C.

300 CAVC, Public List of Practitioners, http://www.uscourts.cavc.gov/practitioners/ (last visited Dec. 24, 2009).

attorney, the CAVC will stay the case and post the order on its website so that advocates can identify and contact the appellants.[301]

In FY 2008, just under 8% of all veterans before the BVA were represented by attorneys.[302] Nearly three-fourths were represented by VSOs, and around 12% were without any representation at all.[303] Before the BVA, parties represented by an attorney were not quite as successful as those represented by a VSO member. The average rate of allowing benefits was 21.9% overall, compared to 20.1% for those represented by an attorney. Some have argued that this is because the VSO representatives are far better acquainted with the "esoterica" of the veterans' benefits system.[304] Represented veterans all fared better than those without representation, who received benefits in only 16% of cases.[305]

The presence of attorneys was beneficial in securing a remand for further fact gathering or for preventing complete denial of benefits. Only 37% of cases overall were remanded, but veterans represented by attorneys had an average of 46.4% remanded. Further, the average rate of denial was 39% overall but only 30% for those claimants with attorneys (the lowest rate).[306] Those without representation fared worst of all, receiving benefits in only 16% of cases, receiving a remand in only 32% of cases, and having benefits denied in nearly half of all cases — the worst in each category.[307]

At the CAVC level, 64% of veterans filed pro se in FY 2008.[308] By the end of the proceedings, only 24% were unrepresented.[309] There are no statistics as to the impact of attorney representation before the CAVC.

E. Applicability of the Veterans' Benefits Hybrid Model

There are a number of reasons why the veterans' benefits adjudication system may not provide an apt model for immigration adjudication.

First, the process is slow, at both the trial and appellate levels. At the BVA level, it took an average of 155 days to process an appeal in FY 2008.[310] In that year, the BVA issued the highest number of decisions since 1991 and heard the highest number of appeals in its history.[311] Therefore, even working at one of its most productive rates in history, the BVA still took over five months to provide a decision. Some scholars and government officials, however, believe the longer time period is actually a necessary byproduct of the higher quality and more accurate decision making.[312]

A high number of decisions from the BVA are remands back to the original Regional Office — over a third of all cases in FY 2008 — and that remand adds more than a year to the appellate process.[313] The most

301 U.S. Court of Appeals for Veterans' Claims, Internal Operating Procedures § II(f) (2004), *available at* http://www.uscourts.cavc.gov/documents/IOP2004.pdf. In addition, the screening judge assigned to the case may direct that the participation of amicus curiae, notwithstanding the stay, be invited in the clerk's order. *See* O'Connor, *supra* note 247, at 356-57; CAVC, Stay Orders in Pro Se Panel Cases, http://www.uscourts.cavc.gov/orders_and_opinions/StayOrders.cfm (last visited Dec. 24, 2009); CAVC, Finding a Representative, http://www.uscourts.cavc.gov/about/how_to_appeal/HowtoAppealWithoutFindingRep.cfm (last visited Dec. 24, 2009).

302 BVA Annual Report, *supra* note 228, at 23.

303 *Id*.

304 O'Connor, *supra* note 247, at 356.

305 BVA Annual Report, *supra* note 228, at 23.

306 *Id*.

307 *Id*.

308 CAVC Annual Reports 1999-2008, *supra* note 253.

309 *Id*. These numbers represent interesting trends. The number of those who file pro se is generally around the same as in FY 1999, although it was much higher (75%) in FY 1998. *See* CAVC Annual Reports 1998-2007, *supra* note 278. There was a marked decrease to around 58% in the early 2000s, but that has increased steadily again, along with the higher numbers of filings. The number of those unrepresented by the end of the proceedings, however, has decreased dramatically, going from 47% in 1998 to somewhere between 19% and 29% in the last five years. This indicates that the efforts made by the CAVC to procure representation for its pro se claimants have borne fruit. *See supra* notes 299-301 and accompanying text.

310 BVA Annual Report, *supra* note 228, at 3.

311 *Id*.

312 Verkuil & Lubbers, *supra* note 221, at 765.

313 BVA Annual Report, *supra* note 228, at 5.

common reasons for remand are the need for a medical examination or opinion, to obtain medical records or to correct a notice error under the Veterans Claims Assistance Act.[314] The slowness of the system is also compounded by the agency's need to recover documents from other agencies, such as the Social Security Administration.[315]

At the CAVC level, the median time from filing to disposition is 446 days.[316] This time period has actually increased over the past decade from just under a year.[317] Given that so many cases are remanded (as discussed below), it is hard to understand precisely why the disposition period is so long.[318]

Appeals to the Federal Circuit also delay the process, but not severely. It takes about eight months from filing to receiving a disposition from the Federal Circuit.[319] The veterans claims are terminated in the second fastest time of all groups of cases before the Federal Circuit.[320]

Second, there is a very large backlog of cases before the BVA. The BVA has been attempting to reduce the backlog and has met with some success, but there were still over 27,000 claims pending at the end of FY 2008.[321]

Third, the system is beset by high remand rates and, therefore, a "recycling" of cases. Scholars have linked the lack of attorney representation in the earlier, fact-gathering stages of the claim to the high remand rates. These remands are often for failure to establish a complete record.[322] Scholars have also argued that the CAVC has failed to protect veterans by stepping in to prevent the "undisciplined pattern of recycling claims."[323] Practitioners have characterized the CAVC as "a remand machine, known as the 'hamster wheel,'" due to its perceived reluctance to give affirmative decisions.[324]

The BVA has implemented a number of new initiatives to reduce the remand figures, such as requiring the BVA to issue explanations for the remands to avoid future recycling.[325] The results appear promising, as the remand rate dropped from nearly 57% in FY 2004 to 36.8% in FY 2008.[326] The CAVC's website lists under its FAQs section the "Top 10 Reasons Why Submissions to the Court are Rejected," presumably in an attempt to lower the number of rejections of veterans' claims for procedural defects.[327]

Fourth, there are patterns of action that arguably show that the CAVC is not as independent as it should be. According to one scholar, the CAVC is not independent enough of the Department of Veterans' Affairs and the BVA in particular, and so does not rebuke the BVA sufficiently.[328] The CAVC has been accused of demonstrating "a pattern of benign indecision."[329] It does not use contempt sanctions against the VA, although it could.[330] The court grants extraordinary relief in extremely few cases.[331] Unrepresented veterans are

---

314 *Id*.

315 Verkuil & Lubbers, *supra* note 221, at 770.

316 CAVC Annual Reports 1999-2008, *supra* note 253.

317 *Id*.

318 *See supra* notes 287-89 and accompanying text.

319 U.S. Court of Appeals for the Federal Circuit, Median Time to Disposition in Cases Terminated After Hearing or Submission, http://www.cafc.uscourts.gov/pdf/MedianDispTime(table)99-08.pdf (last visited Dec. 24, 2009).

320 *Id*.

321 BVA Annual Report, *supra* note 228, at 7.

322 O'Reilly, *supra* note 273, at 226.

323 *Id.* at 224; Verkuil & Lubbers, *supra* note 221, at 770.

324 James G. Fausone & Michael R. Viterna, *Legal Representation of Our Veterans*, State Bar of Mich. Soc. Sec. Newsletter, Spring 2007, *available at* http://www.fb-firm.com/CM/FirmArticles/LegalRepresentation.asp.

325 BVA Annual Report, *supra* note 228, at 5-6.

326 *Id*.

327 CAVC, Top 10 Reasons Why Submissions to the Court are Rejected, http://www.uscourts.cavc.gov/faqs/FAQTop10reasonsrejected.cfm (last visited Dec. 24, 2009).

328 O'Reilly, *supra* note 273, at 228.

329 *Id*. at 232.

330 *Id.* at 232, 234.

331 CAVC Annual Reports 1999-2008, *supra* note 253; O'Reilly, *supra* note 273, at 234.

sanctioned for missing deadlines but there is no equivalent sanction for VA counsel who miss them.[332] According to some practitioners, the CAVC is afraid to challenge the VA because there is a history of conflicts between the two entities.[333]

The veterans' benefits adjudication system is designed to favor the applicants before it. Congress structured the system (at least the VA) to be claimant-friendly. The reason that attorneys do not represent the claimants in the early stages of the benefits system is to ensure that the process remains non-adversarial.

There are other ways in which the veterans system works to favor the veteran. For example, if there is an ambiguity regarding medical facts, that ambiguity is to be construed in favor of the veteran.[334] Similarly, the veteran has a statutory right to assistance from the VA to uncover information that will assist the claimant's presentation of his or her case.[335] For example, there is a very clear, helpful guide to filing an appeal that is made available to all claimants who experience adverse decisions.[336]

332 O'Reilly, *supra* note 273, at 234.

333 *Id.*

334 *Id.* at 231.

335 38 U.S.C. § 5107(a).

336 Bd. of Veterans' Appeals, How Do I Appeal? (2002), *available at* http://www4.va.gov/vbs/bva/010202A.pdf.

Acronyms and Glossary

Reforming the Immigration System

Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases

Prepared by Arnold & Porter LLP for the American Bar Association Commission on Immigration

American Bar Association
Commission on Immigration
740 Fifteenth Street, NW
Washington, DC 20005-1022
202-662-1005

Acronyms and Glossary
Table of Contents

Common Acronyms AG-3
Glossary of Terms AG-5

Acronyms and Glossary

Common Acronyms

ABA	American Bar Association
ACIJ	Assistant Chief Immigration Judge
ATD	(ICE/DRO) Alternatives to Detention
AEDPA	Antiterrorism and Effective Death Penalty Act (1996)
AG	Attorney General
AILA	American Immigration Lawyers Association (now American Immigration Council)
AILF	American Immigration Law Foundation
ALJ	Administrative Law Judge
APA	Administrative Procedure Act
AWO	Affirmance Without Opinion
BCIS	Bureau of Citizenship and Immigration Services (formerly in INS, now USCIS)
BIA	(DOJ/EOIR) Board of Immigration Appeals
CBP	(DHS) Customs & Border Patrol
CAIR Coalition	Capital Area Immigrants' Rights Coalition
CAP	(ICE/DRO) Criminal Alien Program
CAT	Convention Against Torture
DHS	Department of Homeland Security
DOJ	U.S. Department of Justice
DOS	U.S. Department of State
DRO	(ICE) Office of Detention and Removal Operations
EMP	(ICE/DRO) Electronic Monitoring Program
EOIR	(DOJ) Executive Office for Immigration Review

FPS	(DHS) Office of Federal Protective Service
GAO	U.S. Government Accountability Office
GULC	Georgetown University Law Center
ICE	(DHS) Immigration and Customs Enforcement
IJ	Immigration Judge
IIRIRA	Illegal Immigration Reform and Immigrant Responsibility Act (1996)
INA	Immigration and Nationality Act (1952)
INS	(DOJ) Immigration and Naturalization Service
ISAP	(ICE/DRO) Intensive Supervision Appearance Program
LOP	Legal Orientation Program
LPR	Lawful permanent resident
NAIJ	National Association of Immigration Judges
NFOP	(ICE/DRO) National Fugitive Operations Program
NGO	Non-governmental organization
OCIJ	(DOJ/EOIR) Office of the Chief Immigration Judge
OI	(ICE) Office of Investigations
OIA	(ICE) Office of International Affairs
OIG	(DHS or DOJ) Office of the Inspector General
OPR	(DOJ) Office of Professional Responsibility
TRAC	Transactional Records Access Clearinghouse, Syracuse University
USCIS	U.S. Citizenship and Immigration Services (formerly BCIS)

Glossary of Terms

Admission or **admitted:** The lawful entry of an alien into the United States after inspection and authorization by an immigration officer.

Alien: A foreign national; a person who is not a citizen or national of the United States.

Board of Immigration Appeals (BIA or Board): A component of the Executive Office for Immigration Review (EOIR), with up to 15 Board Members, that is the highest administrative body for interpreting and applying immigration laws. The Board has nationwide jurisdiction to hear appeals from certain decisions rendered by Immigration Judges and by District Directors of the Department of Homeland Security (DHS) in a wide variety of proceedings in which the Government of the United States is one party and the other party is either an alien, a citizen, or a business firm.

Consulate: A U.S. government office in a foreign country that issues U.S. visas and passports; a similar office of a foreign country government, located in the United States, that issues visas for travel to that country.

Department of Homeland Security (DHS): A government entity to which the functions of the Immigration and Naturalization Service were transferred on March 1, 2003. DHS was created by combining more than 20 federal agencies under the Homeland Security Act of 2003. Its primary goal is "creating a more effective, organized and united defense of our homeland" by integrating departmental functions, bolstering federal support for state and local emergency preparedness, streamlining and strengthening information sharing among various government entities, establishing private sector partnerships, and improving immigration practices.

Department of Justice (DOJ): A government entity that includes the Executive Office for Immigration Review, which operates under the authority and supervision of the Attorney General.

Deportation or **removal:** The expulsion of an alien from the United States based on a violation of immigration laws.

Executive Office for Immigration Review (EOIR): An office of the Department of Justice that adjudicates immigration cases, including cases involving detained aliens, criminal aliens, and aliens seeking asylum as a form of relief from removal.

Foreign-born: A person born outside the United States to noncitizen parents.

Immigrant or **lawful permanent resident:** A foreign national who has obtained the right to reside permanently in the United States. Individuals usually qualify for permanent residence on the basis of ties to close family members or a U.S. business.

INS: Immigration and Naturalization Service, an agency of the U.S. Department of Justice that, until March 1, 2003, administered and enforced immigration and nationality laws. After March 1, 2003, INS functions were transferred to DHS bureaus including **U.S. Citizenship and Immigration Services (USCIS)** and **U.S. Immigration and Customs Enforcement (ICE)** below.

Naturalization: A process by which individuals may obtain U.S. citizenship. With some limited exceptions, generally only permanent residents and noncitizen nationals are eligible for naturalization .

Noncitizen: (See "alien.")

Nonimmigrant: A foreign national who is admitted to the United States for a temporary period and a specific purpose (such as tourism or study).

Office of the Chief Immigration Judge (OCIJ): An office within the Executive Office for Immigration Review that is responsible for providing overall program direction, articulating policies and procedures, and establishing priorities for the immigration judges and the immigration courts. The Chief Immigration Judge carries out these responsibilities with Deputy and Assistant Chief Immigration Judges, a Chief Clerk's Office, a Language Services Unit, and other functions that coordinate management and operation of the immigration courts.

Refugee or **asylee:** A person who is outside his or her country of nationality or last residence and who is unable or unwilling to return to that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. A person obtaining refugee or asylee status in the United States is entitled to remain in the United States, and may apply for permanent residence.

Removal proceeding: An immigration court proceeding to determine whether a person can be admitted to or removed from the United States.

Respondent: A person in removal or deportation proceedings.

Undocumented person (also sometimes called "unauthorized" or "illegal" alien): A person who lacks U.S. government authorization to enter or remain in the United States.

U.S. citizen: A person who owes permanent allegiance to the United States, and who enjoys full civic rights (for example, the right to vote in elections and to run for elective office).

U.S. Citizenship and Immigration Services (USCIS): A bureau of the Department of Homeland Security responsible for the administration of immigration benefits and services, such as processing applications for residency and citizenship.

U.S. Customs and Border Protection (CBP): A bureau of the Department of Homeland Security responsible for patrolling the borders and monitoring the movement of goods and people into and out of the U.S.

U.S. Immigration and Customs Enforcement (ICE): A bureau of the Department of Homeland Security responsible for handling deportations, investigating immigration law violations and enforcing customs laws within the interior of the U.S.

U.S. noncitizen national: A person who owes permanent allegiance to the United States, but who does not enjoy full civic rights. For example, citizens of Guam, the Northern Mariana Islands and other U.S. territories are nationals, but not citizens, of the U.S.

Visa: A document issued by a government that establishes the bearer's eligibility to seek entry into that government's territory. A visa can be for a temporary period, such as for study or tourism (nonimmigrant visas), or for lawful permanent residence (immigrant visas). U.S. consulates abroad issue visas to foreign nationals, permitting them to travel to the United States and request admission at the border. U.S. citizens need visas to travel to foreign countries for certain purposes.

AMERICAN BAR ASSOCIATION

Defending Liberty
Pursuing Justice

Commission on Immigration
740 Fifteenth Street, NW
Washington, DC 20005-1022
immcenter@abanet.org